(6)

No. 06-157
Title: Jay F. Hein, Director, White House Office of Faith-Based and Community Initiatives, et al., Petitioners
v.
Freedom From Religion Foundation, Inc., et al.
Docketed: August 1, 2006
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (05-1130)
Decision Date: January 13, 2006
Rehearing Denied: May 3, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 1 2006	Petition for a writ of certiorari filed. (Response due August 31, 2006)
Aug 30 2006	Waiver of right of respondents Freedom From Religion Foundation, Inc., et al. to respond filed.
Aug 31 2006	Brief amici curiae of Indiana, et al. filed.
Sep 13 2006	DISTRIBUTED for Conference of October 6, 2006.
Sep 19 2006	Response Requested . (Due October 19, 2006)
Oct 16 2006	Order extending time to file response to petition to and including November 2, 2006.
Oct 30 2006	Brief of respondent Freedom From Religion Foundation, Inc., et al. in opposition filed.
Nov 15 2006	DISTRIBUTED for Conference of December 1, 2006.
Nov 15 2006	Reply of petitioners Jay F. Hein, Director, White House Office of Faith-Based and Community Initiatives, et al. filed. (Distributed)
Dec 1 2006	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, January 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 2, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 16, 2007.
Dec 15 2006	Motion to dispense with printing the joint appendix filed by the Solicitor General.
Dec 18 2006	SET FOR ARGUMENT ON Wednesday, February 28, 2007.
Jan 3 2007	Brief amicus curiae of American Center for Law and Justice filed.
Jan 5 2007	Brief of petitioners Dennis Grace, Acting Director, White House Office of Faith-Based and Community Initiatives, et al. filed.
Jan 5 2007	Brief amicus curiae of We Care America filed.
Jan 5 2007	Brief amicus curiae of Foundation for Moral Law, Inc. filed.
Jan 5 2007	Brief amici curiae of Indiana, et al. filed.
Jan 5 2007	Brief amicus curiae of Christian Legal Society filed.
Jan 8 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 16 2007	Record received from U.S.C.A. for Seventh Circuit. (1 envelope)
Jan 18 2007	CIRCULATED.
Jan 19 2007	Record received from U.S.D.C. for Western District of Wisconsin. (1 box)
Feb 1 2007	Brief amici curiae of American Jewish Congress and American Jewish Committee filed. (Distributed)
Feb 2 2007	Brief amicus curiae of American Atheists, Inc. filed. (Distributed)

Feb 2 2007	Brief amici curiae of Center for Inquiry, et al. filed. (Distributed)
Feb 2 2007	Brief of respondents Freedom From Religion Foundation, Inc., et al. filed. (Distributed)
Feb 2 2007	Brief amici curiae of Legal and Religious Historians and Law Scholars Paul Finkelman, et al. filed. (Distributed)
Feb 2 2007	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 16 2007	Reply of petitioners Dennis Grace, Acting Director, White House Office of Faith-Based and Community Initiatives, et al. filed. (Distributed)
Feb 28 2007	Argued. For petitioners: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For respondents: Andrew J. Pincus, Washington, D.C.

Supreme Court, U.S.
FILED
06-157 AUG 1 - 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DENNIS GRACE, ACTING DIRECTOR OF THE WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
GREGORY G. KATSAS
Deputy Assistant Attorney General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

PARTIES TO THE PROCEEDINGS

The petitioners, who were sued in their official capacity as defendants-appellees below, are Dennis Grace, Acting Director of the White House Office of Faith-Based and Community Initiatives, Steven McFarland, Director of the Department of Justice Center for Faith-Based and Community Initiatives, Jedd Medefind, Director of the Department of Labor Center for Faith-Based and Community Initiatives, Greg Morris, Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives, Robert Bogart, Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives, Shayam K. Menon, Director of the Department of Education Center for Faith-Based and Community Initiatives, Therese Lyons, Director of the Department of Agriculture Center for Faith-Based and Community Initiatives, and Andrew Rajec, Acting Director of the Agency for International Development Center for Faith-Based and Community Initiatives.*

Rod Paige, the former Secretary of the United States Department of Education, was a defendant-appellee below, but is not a petitioner in this Court. Elaine L. Chao, Secretary of the United States Department of Labor, Tommy G. Thompson, the former Secretary of the United States Department of Health and Human Services, Alberto R. Gonzales, Attorney General, Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, and David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, were originally defendants in the district court, but

---

* Pursuant to Supreme Court Rule 35(3), each of the petitioners has been substituted for their predecessors in office, who were the originally named defendants.

were dismissed from the case in district court and were not parties to the appeal. Neither they nor their successors are parties before this Court.

The respondents, who were plaintiffs-appellants below, are Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, and the Freedom from Religion Foundation, Inc., a non-stock corporation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Reasons for granting the petition 9
A. The Seventh Circuit's decision contradicts the clear teachings of this Court's taxpayer standing cases 9
B. The Seventh Circuit's decision conflicts with the decisions of other circuits that have faithfully applied this Court's taxpayer standing cases 23
C. The question presented is of fundamental importance and warrants this Court's immediate review 25
Conclusion 29
Appendix A 1a
Appendix B 27a
Appendix C 36a
Appendix D 58a
Appendix E 67a
Appendix F 82a

TABLE OF AUTHORITIES

Cases:

American Jewish Congress v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978) 23, 24
Bowen v. *Kendrick*, 487 U.S. 589 (1988) 12, 14, 16, 17
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) 10, 11, 12, 13, 23, 28

Cases—Continued: Page

District of Columbia Common Cause v. *District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988) 8
Doremus v. *Board of Educ.*, 342 U.S. 429 (1952) 11, 17, 18
Everson v. *Board of Educ.*, 330 U.S. 1 (1947) 17
Flast v. *Cohen*, 392 U.S. 83 (1968) ..... *passim*
Frothingham v. *Mellon*, 262 U.S. 447 (1923) 10
Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) 20
Laskowski v. *Spellings*, 443 F.3d 930 (7th Cir. 2006) . 25, 26
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 10
Public Citizen, Inc. v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976) 23, 24
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 13, 15
School Dist. of Abington Twp. v. *Schempp*, 374 U.S. 203 (1963) 20
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 5
United States v. *Armstrong*, 517 U.S. 456 (1996) 21
United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 21
United States v. *Richardson*, 418 U.S. 166 (1974) 13
United States Catholic Conference, In re, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990) 8, 24

Cases—Continued: Page

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) ..... *passim*
Van Orden v. *Perry*, 125 S. Ct. 2854 (2005) 20

Constitution, statutes and regulations:

U.S. Const.:
Art. I (Taxing and Spending Clause) ..... *passim*
Art. III ..... *passim*
§ 2 ..... 10, 82a
Amend. I 20, 23, 82a
Establishment Clause ..... *passim*
Promoting Safe and Stable Families Amendment of 2001, Pub. L. No. 107-133, § 121, 115 Stat. 2419 (42 U.S.C. 629i (Supp. III 2003)) 16
26 U.S.C. 501(c)(3) 4
Exec. Order No. 13,198, 3 C.F.R. 750 (2002) 2
§ 2 3
Exec. Order No. 13,199, 3 C.F.R. 752 (2002) 2
§ 1 2
§ 2 2
§ 3(j) 2
Exec. Order No. 13,279, 3 C.F.R. 258 (2003):
§ 2(c) 3
§ 2(d) 3
§ 2(f) 3

Regulations and rule—Continued: Page

Exec. Order No. 13,280, 3 C.F.R. 262 (2003) 2
Exec. Order No. 13,342, 3 C.F.R. 180 (2005) 2
Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006) 2

Miscellaneous:

United States Census Bureau, *State and Metropolitan Area Data Book: 2006*, at 109, Table A-79 (visited July 28, 2006) <http://www.census.gov/compendia/smabd/TableA-79.pdf> 27

In the Supreme Court of the United States

No.

DENNIS GRACE, ACTING DIRECTOR OF THE WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Dennis Grace, the Acting Director of the White House Office of Faith-Based and Community Initiatives, and the other federal petitioners, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc, and the accompanying opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 58a-66a), are reported at 447 F.3d 988. The opinion of the district court denying in part the defendants' motion to dis-

miss the complaint for lack of Article III standing (App., *infra*, 27a-35a), and the final judgment of the district court (App., *infra*, 36a-57a), are unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2006. The government's petition for rehearing was denied on May 3, 2006 (App., *infra*, 59a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 2001, the President created by Executive Order the White House Office of Faith-Based and Community Initiatives (White House Office) within the Executive Office of the President. See Exec. Order No. 13,199, 3 C.F.R. 752 (2002). The White House Office has "lead responsibility" within the Executive Branch for establishing policies, priorities, and objectives designed to "expand the work of faith-based and other community organizations to the extent permitted by law." *Id.* § 2. The President's "paramount goal" is to ensure that "private and charitable community groups, including religious ones, * * * have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes." *Id.* § 1. To that end, the White House Office aims "to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems." *Id.* § 3(j).

The President created Executive Department Centers for Faith-Based and Community Initiatives (agency Centers) in a number of federal agencies. See Exec. Order No. 13,198, 3 C.F.R. 750 (2002); Exec. Order No. 13,280, 3 C.F.R. 262 (2003); Exec. Order No. 13,342, 3 C.F.R. 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006). The purpose of those Centers is "to coordinate department efforts to elimi-

nate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." 3 C.F.R. 750, § 2 (2002).

The President undertook this initiative to ensure that "faith-based organizations [w]ould be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character," as long as they "do[] not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13,279, 3 C.F.R. 258, § 2(f) (2003). At the same time, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration of Federal financial assistance under social service programs," *id.* § 2(c), and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.* § 2(d).

2. The Freedom From Religion Foundation and three of its members, who are alleged to be federal taxpayers, App., *infra*, 68a-69a paras. 7-9 (collectively, "Foundation"), filed this action against the Director of the White House Office and the Directors of Centers at the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, and Agriculture, as well as the Director

of the Center at the Agency for International Development. See *id.* at 67a-80a.[1]

The Foundation contended that the defendant officials violated the Establishment Clause by organizing national and regional conferences at which faith-based organizations allegedly "are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." App., *infra*, 73a para. 32. The Foundation further alleged that the defendant officials "engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-based organizations." *Id.* at 77a para. 41. The Foundation also alleged that "Congressional appropriations [are] used to support the activities of the defendants." *Id.* at 79a para. 45.

The Foundation's complaint seeks a declaratory judgment that the officials' activities violate the Establishment Clause, an injunction prohibiting further "use [of] appropriations in violation of the Establishment Clause," and "an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations" comport with the Establishment Clause. App., *infra*, 80a. The Foundation and its three members asserted standing based solely on their federal taxpayer status. *Id.* at 68a-69a paras. 4-10.[2]

---

[1] Initially, the Foundation also sued David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, and the Director of the Centers for Disease Control and Prevention, but it subsequently voluntarily dismissed the claims against those defendants. App., *infra*, 37a.

[2] Because the Foundation itself is a non-profit entity that is exempt from paying federal income taxes under 26 U.S.C. 501(c)(3), the Foundation lacks taxpayer status in its own right, and can assert it, if

3. Petitioners, the Directors of the White House Office and the agency Centers, moved to dismiss the complaint against them for lack of standing. The district court granted the motion to dismiss. App., *infra*, 27a-35a.

The district court reasoned that federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of "exercises of congressional power under the taxing and spending clause of Art. I, § 8." App., *infra*, 31a (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)). The court held that the challenged activities of the White House Director and the Directors of the agency Centers—organizing conferences and making speeches—"are not 'exercises of congressional power' as required by the *Flast* test." *Id.* at 34a. The court noted that the Director of the White House Office acts "on the President's behalf," and that none of the petitioners is "charged with the administration of congressional programs." *Id.* at 33a, 34a. "The view that federal taxpayers as such should be permitted to bring Establishment Clause challenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations," the district court concluded, "has never been accepted by a majority of the Supreme Court." *Id.* at 33a.[3]

---

at all, only on behalf of its taxpaying members. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

[3] The district court dismissed the Foundation's claim against former Secretary of Education Rod Paige, and the court of appeals affirmed that dismissal. App., *infra*, 14a-15a, 35a. The Foundation's amended complaint also asserted claims that the heads of certain federal agencies had violated the Establishment Clause by "directly and preferentially fund[ing]" particular programs that allegedly "integrate religion as a substantive and integral component" of their activities. *Id.* at 77a-79a paras. 42, 43. The Foundation voluntarily dismissed all of those claims with the exception of two programs administered by the Secretary of Health and Human Services. The district court subsequently granted summary judgment for the Secretary with respect to one of those

4. A divided court of appeals vacated the district court's order of dismissal and remanded. App., *infra*, 1a-16a.

a. The majority held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order," as long as the actions of Executive Branch officials are financed by general appropriations. App., *infra*, 16a. In the majority's view, taxpayer standing extends beyond programs that allocate federal funding to third parties, and includes challenges to any Executive Branch activity funded "from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power," *id.* at 11a, as opposed to funding "from, say, voluntary donations by private citizens," *ibid.* Standing accordingly exists even if "there is no statutory program" enacted by Congress under its Taxing and Spending power, *ibid.*, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a.

The majority noted, however, that standing would not exist to challenge "incidental" expenditures, which it defined as "such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion." App., *infra*, 14a. Because the Foundation challenged a series of Executive Branch activities, however, the court held that the use of general appropriations to finance the officials' actions sufficed to support taxpayer standing under Article III of the Constitution. *Id.* at 16a.

---

claims, and for the Foundation with respect to the other. *Id.* at 56a-57a. Neither of those decisions was appealed, and they are not at issue before this Court. *Id.* at 14a-15a. Accordingly, only petitioners remain as potential defendants in any further district court litigation.

b. Judge Ripple dissented. App., *infra*, 16a-26a. In his view, allowing a taxpayer to challenge the conduct of Executive Branch officials "so long as that conduct was financed in some manner by a congressional appropriation" reflects a "dramatic expansion of current standing doctrine." *Id.* at 16a. Judge Ripple reasoned that, by predicating taxpayer standing on the nearly universal use of general appropriations funds to finance the activities of government officials, rather than Congress's specific appropriation of funds to finance the activities of private entities, the majority had "cut[] the concept of taxpayer standing loose from its moorings." *Id.* at 19a. Judge Ripple explained that this Court had first recognized taxpayer standing in Establishment Clause cases to ensure that Congress could not "support[] a sectarian cause through the transfer of public funds," because that was "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption." *Id.* at 22a (quoting *Flast*, 392 U.S. at 103).

Judge Ripple criticized the majority for abandoning *Flast*'s "narrow terms," App., *infra*, 19a, which have required that "a plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power," *id.* at 22a. The majority's approach, Judge Ripple observed, now "makes virtually any executive action subject to taxpayer suit" because "[t]he executive can do nothing without general budget appropriations from Congress." *Id.* at 24a. In Judge Ripple's view, the majority's decision "expand[s] the narrow concept of taxpayer standing to the point where it cannot be distinguished from the citizen standing that the Supreme Court has regarded * * * as destructive of the case and controversy limitation on the power of the federal courts." *Ibid.*

In so doing, Judge Ripple concluded, the majority "sets this circuit on a course different from that of the other courts

to have applied the *Flast* exception." App., *infra*, 24a (citing *District of Columbia Common Cause* v. *District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990)).

5. By a vote of 7-4, the court of appeals denied the government's petition for rehearing en banc. However, two of the judges that voted against rehearing en banc filed separate opinions explaining that further review by the Seventh Circuit was not warranted because "the obvious tension which has evolved in this area of jurisprudence * * * can only be resolved by the Supreme Court," and "the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation." App., *infra*, 59a (Flaum, C.J., concurring in the denial of rehearing en banc); see *id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc) (explaining that the court's decision on a matter that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review," and "[m]y vote to deny rehearing rests on a conclusion that this is not the right forum for that further deliberation").

Four judges (Ripple, J., joined by Manion, Kanne, and Sykes, JJ.) dissented from the denial of rehearing en banc, App., *infra*, 63a-66a, stating that the panel's decision "has serious implications for judicial governance," and "departs significantly from established Supreme Court precedent and creates an inter-circuit conflict," *id.* at 63a. As the dissent explained, "the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing." *Id.* at 65a. In the dissenters' view, the majority's decision contravened that

"very clear line," and "[a]bolishing or even diluting a standard so explicitly set by the Supreme Court simply is not an appropriate decision for us to make." *Ibid.*

REASONS FOR GRANTING THE PETITION

The divided court of appeals' decision in this case transforms taxpayer standing in the Establishment Clause context from a narrow exception, designed to prevent the specific historic evil of direct legislative subsidization of religious entities, into a roving license for any "individual citizen to challenge any action of the executive with which he disagrees, as violative of the Establishment Clause." App., *infra*, 24a (Ripple, J., dissenting). The court's decision not only cuts taxpayer standing from its constitutional and historical moorings, but also contravenes this Court's precedents and the decisions of other circuits. Indeed, the far-reaching implications of the court's ruling—and its sharp departure from this Court's teachings—prompted more than half of the Seventh Circuit's judges to take the extraordinary step of calling for this Court's review of the decision. See *id.* at 59a (Flaum, C.J., concurring in the denial of rehearing en banc), 59a-62a (Easterbrook, J., concurring in the denial of rehearing en banc), 63a-66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc). The Court should grant certiorari and reaffirm the fundamental limits on taxpayer standing in this context.

A. The Seventh Circuit's Decision Contradicts The Clear Teachings Of This Court's Taxpayer Standing Cases

The court of appeals' decision conflicts sharply with decisions of this Court strictly limiting the circumstances in which a plaintiff's taxpayer status alone confers Article III standing.

1. a. Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. An "essential and unchanging" com-

ponent of that requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that the plaintiff, *inter alia*, "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted).[4]

This Court has generally rejected taxpayer status as a proper basis on which to predicate Article III standing, because a federal taxpayer's interest in the moneys of the treasury "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" and because the injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1862 (2006) (citations omitted). "Proper regard for the complex nature of our constitutional structure

---

[4] To establish standing, a plaintiff also must demonstrate traceability and redressability. In other words, the plaintiff must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (internal quotation marks and citations omitted).

requires" that courts not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

b. In *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court recognized a narrow exception to the general prohibition on taxpayer standing. The Court held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. *Id.* at 102-104. The Court underscored, however, that taxpayer standing would extend "only [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" that are challenged on Establishment Clause grounds. *Id.* at 102. The Court made clear that it did not suffice "to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and pointed as an example to the complaint in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), that publicly funded school teachers engaged in religious activities pursuant to a state law calling for the reading of the Bible in public school. The Court rejected that claim as a basis for taxpayer standing. [5]

---

[5] *Flast* also held that the taxpayer must allege that Congress's exercise of its legislative power "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," like the Establishment Clause's prohibition on the disbursement of tax dollars to religious entities, 392 U.S. at 102-103. The Court has never held that any other constitutional constraint on Congress's taxing and spending power would support taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864 ("[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*.") (internal quotation marks and citation omitted).

That narrow departure in *Flast* from Article III's general prohibition on taxpayer standing was warranted, in the Court's view, because "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S. at 103. The Court thus grounded the type of personal injury needed to establish taxpayer standing in this context on the historic constitutional concern that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment." *Ibid.* (citation omitted). Given the unique constitutional and historical pedigree of the concern with the contribution of money raised by the government to outside religious entities—which the Court tied to Madison's "famous Memorial and Remonstrance Against Religious Assessments," *ibid.*—the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could support Article III standing. *Id.* at 106.

c. In the ensuing four decades, this Court has consistently reaffirmed that *Flast* is a "narrow" and rarely invoked exception to the rule that taxpayer status is insufficient to establish Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1865; see *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*."); *Valley Forge*, 454 U.S. at 481 (discussing the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied").

This past Term the Court reiterated that *Flast* has a "narrow application in our precedent," *DaimlerChrysler*, 126 S. Ct. at 1865, and is strictly limited to a challenge to "congressional action under the taxing and spending clause"

claimed to be "in derogation of the Establishment Clause," *id.* at 1864 (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing exists in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of protecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

Likewise, in *Valley Forge*, the Court emphasized that the limits to the narrow *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property." *Id.* at. 479. The Court explained that, while the agency's actions necessarily entailed the use of tax money, "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed only [at] exercises of congressional power." *Id.* at 479 (internal quotation marks omitted). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15.[6]

---

[6] See also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227-228 (1974) (finding no taxpayer standing in a suit where the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); *United States* v. *Richard-*

Finally, in *Bowen* v. *Kendrick*, the Court reaffirmed that taxpayer standing does not exist to challenge, on Establishment Clause grounds, "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 487 U.S. at 619 (quoting *Flast*, 392 U.S. at 102). At the same time, *Bowen* held that a statutory spending program enacted pursuant to Congress's power to tax and spend does not fall outside the *Flast* rule just because it is administered by Executive Branch officials. See *ibid.* The Court explained that a challenge to "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620. The claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]." *Id.* at 619. The key point was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620.

2. The court of appeals' holding that the Foundation has taxpayer standing to challenge an Executive Branch's program, alleged to promote religion, without challenging either a specific congressional appropriation or a direct transfer of funds to a religious entity, just because the Executive Branch's activity "is financed by a congressional appropria-

---

son, 418 U.S. 166, 175 (1974) (holding that a taxpayer lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA").

tion," App., *infra*, 16a, flatly contradicts that precedent in three fundamental respects.

First, an essential prerequisite to taxpayer standing is a "challenge[] directed only [at] exercises of *congressional* power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (internal quotation marks omitted) (emphasis added); *Flast*, 392 U.S. at 106 (challenge must be to "congressional action under the taxing and spending clause" allegedly in derogation of the Establishment Clause); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged.").

The Foundation, however, challenges Executive—not congressional—action in this case. The Foundation's complaint does not ask the Court to invalidate any congressional action, on its face or as applied, or even any specific Executive Branch decision to transfer funds to an outside entity. See App., *infra*, 60a ("[P]laintiffs in this litigation do not say that they have paid one extra penny because of the [conduct at issue].") (Easterbrook, J., concurring in the denial of rehearing en banc); *id.* at 64a ("Here, as in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress.") (Ripple, J., dissenting from the denial of rehearing en banc).

The Foundation challenges only the fact that Executive Branch officials have decided to dedicate their time and attention to certain issues and events, such as the organization and conduct of various conferences.[7] The fact that those executive

---

[7] See App., *infra*, 77a para. 40 (challenging the "actions and/or words" of Executive Branch officials); *id.* at 75a-76a paras. 34, 35 (challenging the content of presidential speeches); *id.* at 77a para. 41 (challenging Executive Branch officials' "myriad activities, such as making public appearances and giving speeches"); *id.* at 73a para. 32 (challenging Executive Branch officials' "support of national and regional conferences"); *id.* at 76a-77a paras. 36, 39 (challenging Executive Branch

activities are funded by general appropriations, however, does not transform the Foundation's complaint into a challenge to "*congressional action* under the taxing and spending clause" allegedly in derogation of the Establishment Clause. *Flast*, 392 U.S. at 106 (emphasis added). The gravamen of the complaint is not that Congress has appropriated funds to pay the salaries and expenses of Executive Branch officials, but that Executive Branch officials have made discretionary judgments about how to spend their time (and indirectly taxpayer money) in an impermissible manner. The challenge goes to the Executive's "use" of general appropriations. App., *infra*, 79a para. 44. But, unlike *Kendrick*, it challenges only the use of such general appropriations to fund internal Executive Branch activities, as opposed to specific spending decisions made pursuant to a challenged "statutory mandate." 487 U.S. at 620.[8]

Second, in the absence of a legislative program calling for the disbursement of federal funds to private entities, there is no "logical link," *Flast*, 392 U.S. at 102, between the Founda-

---

officials' organization and conduct of conferences).

[8] As noted above, note 3, *supra*, the Foundation did challenge the administration of a specific statutory grant program—"Mentoring Children of Prisoners," which was established by Congress pursuant to the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, § 121, 115 Stat. 2419 (42 U.S.C. 629i (Supp. III 2003))—that authorized funding faith- and community-based organizations. The Foundation argued that the disbursement of funds pursuant to that program to a religious organization violated the Establishment Clause. The district court recognized taxpayer standing to challenge that specific grant and granted summary judgment to the Foundation on that claim, but that aspect of the district court's decision was not appealed. See note 3, *supra*; App., *infra*, 20a-22a (Ripple, J., dissenting). That allegation, unlike the ones that are before the Court, was focused on the exercise of Congress's taxing and spending power and the disbursement of funds to religious entities.

tion's allegations and its members' taxpayer status, and thus no "injury" that could give rise to Article III standing. In both *Flast* and *Kendrick*—the only two cases in which this Court has upheld taxpayer standing—the taxpayers challenged congressionally authorized programs that distributed federal funds to private entities, including religious organizations. In *Flast*, the Court observed that "[t]he gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in * * * religious schools." 392 U.S. at 85. Likewise, in *Kendrick*, the Court stressed that the plaintiffs' constitutional objections were to the "disbursement of funds" and "how the funds authorized by Congress are being disbursed" to sectarian grantees. 487 U.S. at 619-620; see *id.* at 619 (taxpayer standing sustained because congressionally authorized funds "flowed through" the agency to private grantees).

The Foundation's challenge, by contrast, is analogous to the taxpayer challenge in *Doremus*, which *Flast* pointed to as an example of an insufficient taxpayer injury. In *Doremus*, tax funds would pay teacher salaries whether or not the teachers read from the Old Testament. Likewise, here, the only appropriations at issue are the general appropriations that pay for the federal officials' salaries and offices, which would be appropriated whether or not the officials engaged in the conduct respondents challenge.[9]

---

[9] In *Doremus*, the Court, in an opinion by Justice Jackson, emphasized that the alleged Establishment Clause violation—a state law authorizing the reading of Bible passages in public schools—was not "supported by any separate tax or paid for from any particular appropriation," and did not "add[] any sum whatever to the cost of conducting the school." 342 U.S. at 433. The Court contrasted the case with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which the plaintiff "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. The Court accordingly concluded, in

A challenge to the disbursement of funds to religious entities is a critical prerequisite for taxpayer standing because such outlays trigger the unique historic concern upon which *Flast*'s narrow exception rests. *Flast* concluded that the Framers' particular concern with the use of federal tax funds to finance or subsidize churches or the clergy meant that each taxpayer has a singular interest in ensuring that his "three pence" not be extracted and spent to support a church. *Flast*, 392 U.S. at 103. As the Court explained—citing to Madison's *Memorial and Remonstrance Against Religious Assessments*—the Establishment Clause was specifically designed to prevent the use of the "taxing and spending power" to support religious entities. *Ibid.* That "specific evil," *ibid.*, arises directly and exclusively out of an exercise of the taxing and spending power. The funding of religious entities by the government thus uniquely triggers a historically recognized individualized injury rooted solely in the Taxing and Spending Clause, which no other Establishment Clause or constitutional violation causes. It is that special history, and that history alone, that explains why this particular usage of taxpayer funds gives rise to taxpayer standing, when all other taxpayer-standing claims are foreclosed by Article III.

While recognizing that every taxpayer has a concern with disbursements to churches might be understood as relaxing the general rule that the injury be particularized—or at least infusing the rule with a special historic meaning in this context—the requirement of a congressionally authorized disbursement to a third party has the added benefit of ensuring that the dispute is concrete and crystallized. Here, the court of appeals allowed a challenge to internal Executive Branch

---

Doremus, that "[i]t is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." *Ibid.*; see *Valley Forge*, 454 U.S. at 477-478 (discussing *Doremus*).

prioritizations that may or may not ever result in concrete decisions to make disbursements to religiously-affiliated entities. To the extent such awards are made pursuant to a statutory mandate, they can be challenged either by taxpayers (as was true of challenges to specific grants in this very case) or by others, such as interested, non-religious grantees, who presumably would have standing under traditional Article III principles (without regard to whether a grant is made pursuant to a statutory mandate). But allowing a challenge to executive decisions that do not result in grants would open the courthouse door to abstract and generalized grievances that Executive Branch officials are too solicitous of religious entities. Indeed, that appears to be the essence of the Foundation's claims.

To establish the requisite taxpayer injury to support standing, a plaintiff therefore must challenge the disbursement of funds to private religious entities, either directly by an Act of Congress, as in *Flast*, or by an agency at Congress's specific direction, as in *Kendrick*. Alleging nothing more than a link between the challenged governmental activity and the funding of Executive Branch operations from general appropriations is too attenuated a claim to give rise to taxpayer standing. Cf. *Valley Forge*, 454 U.S. at 480 n.17 ("[A]ny connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent."). In other words, the Foundation has alleged at most a generalized grievance concerning executive action, not the kind of concrete congressional extraction and disbursement of funds that gives rise to Article III standing under *Flast*.

Third, by disregarding those fundamental principles, the court of appeals has loosed taxpayer standing from its constitutional and historical moorings. There was no Memorial and Remonstrance against the use of general legislative appropriations to finance the operations of a coordinate branch of gov-

ernment. Nor were executive meetings or communications with religious groups, religious references in public speeches, or any other operational activity of Executive Branch officials among the "*specific* evils feared by those who drafted the Establishment Clause." *Flast*, 392 U.S. at 103 (emphasis added).[10]

Quite unlike the specific historic evil that the *Flast* exception was designed to address, no federal funds in this case were disbursed to any religious entity, and the "plaintiffs in this litigation do not say that they have paid one extra penny because of the [executive actions at issue]." App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc). The Foundation's interest in ensuring that Executive Branch officials comport their speech and conduct their meetings in compliance with its view of the Establishment Clause has no distinct historical grounding or status. Taxpayers paid the President's salary when President Washington issued the first Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer" for "the many and signal favors of Almighty God." *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2861 (2005) (citation omitted). They also paid the salary of President Lincoln when he delivered the Gettysburg Address, with its "extensive acknowledgments of God." *Id.* at 2863 n.9. But concern about

---

[10] Quite the opposite, religious themes appear frequently in the Nation's founding documents and the speeches and letters of the Framers. See, *e.g.*, *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2859 (2005) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.") (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 213 (1963)); *id.* at 2861-2862 (citing additional examples); cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) ("Citizens * * * have no First Amendment right not to fund government speech.").

a President's decision to spend time in such endeavors is nothing more than an abstract, generalized grievance. There is nothing individualized, concrete or particularized about that injury, beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees," which is plainly insufficient to support standing. *Valley Forge*, 454 U.S. at 485; see App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc) ("Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful.").

The court of appeals considered it necessary to expand the capacity of every taxpayer to police the Executive Branch's compliance with the Establishment Clause "because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." App., *infra*, 13a. But the Republic has endured for more than 200 years without such an extravagant concept of taxpayer standing, and courts are not free to craft standing principles based on the presumption that the Executive Branch will flout the Establishment Clause or any other constitutional command. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[C]ourts presume that [public officers] have properly discharged their official duties.") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 15 (1926)). Furthermore, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489 (citation omitted). That approach "would convert standing into a requirement that must be observed only when satisfied." *Ibid.*

In any event, this is *not* a context in which plaintiffs could not be found for any concrete action that might ultimately emerge from the executive's encouragement of religiously-

affiliated entities to participate in funding programs. *Flast* and *Kendrick* would allow taxpayer challenges to any actual disbursements pursuant to statute, as demonstrated by this very case, see note 3, *supra*. And, even apart from *Flast*, a disappointed non-religious grantee would have standing to sue. To the extent there would be no available plaintiff to challenge the preliminary deliberative process that led to the grant, that is only because deliberations, apart from the disbursement of funds, inflict, at most, an inchoate injury.

Beyond that, the court of appeals' rationale defies this Court's decision in *Valley Forge* that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." 454 U.S. at 477. Indeed, the proposition that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are [just] * * * nuisances that may be dispensed with when they become obstacles to that transcendent endeavor * * * has no place in our constitutional scheme." *Id.* at 489.

Under the court of appeals' decision, however, only counsel's creativity in crafting the complaint stands as an obstacle to tens of millions of taxpayers obtaining standing to act as monitors of the government's Establishment Clause compliance. Indeed, under the Seventh Circuit's decision, the result in *Valley Forge* was a product of pleading error, not constitutional limitation. Had the plaintiffs simply asserted a taxpayer injury based on the use of "appropriations for the general administrative expenses" involved in selling federal property to a religious group, App., *infra*, 11a, the plaintiffs could have asserted taxpayer standing under the decision below. See *Valley Forge*, 454 U.S. at 467-468 (describing administrative measures involved in the property sales).

"[S]uch a broad application of *Flast*'s exception to the general prohibition on taxpayer standing [is] quite at odds with its narrow application in [this Court's] precedent and

Flast's own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *DaimlerChrysler*, 126 S. Ct. at 1865. Indeed, if interpreted in that open-ended fashion, *Flast* could not stand with the precedents of this Court—both before and after *Flast*—that faithfully apply the limits of Article III and the taxpayer standing doctrine. The court of appeals' sharp break with this Court's taxpayer standing precedents, and the fundamental separation-of-powers principles on which they are grounded, accordingly merits this Court's review.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuits That Have Faithfully Applied This Court's Taxpayer Standing Cases

As noted by the four Seventh Circuit judges who dissented from the denial of rehearing en banc, the court's decision not only contravenes this Court's precedents, but also conflicts with rulings of other circuits. App., *infra*, 24a-26a, 65a-66a.

In *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978), the plaintiffs, like the Foundation here, filed suit on the ground that "executive officials" "expended governmental funds to effectuate cooperative programs" with third parties in a manner that violated, *inter alia*, the First Amendment. *Id.* at 944. The District of Columbia Circuit held, however, that the claim to federal taxpayer standing "falter[ed]" because the plaintiffs' allegations were "directed at executive action rather than at a congressional enactment under article I, section 8" (*i.e.*, Congress's taxing and spending authority). *Ibid.* As a result, "the general rule that a federal taxpayer's interest in Treasury moneys is too indeterminate, remote, and abstract to support standing" compelled the conclusion that the plaintiffs lacked standing. *Ibid.* See *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 218-219 (D.C. Cir. 1976) (no taxpayer standing to challenge "mere executive

activity that entails some expenditures"—*viz.*, requiring the Secretary of the Treasury to recoup allegedly improper salary payments to White House staff members).

Thus, had the Foundation challenged in the District of Columbia Circuit the petitioners' "cooperation in programs" with religious entities, *American Jewish Congress*, 575 F.2d at 941, based on the fact that such "executive activity * * * entails some expenditures" of taxpayer funds, *Simon*, 539 F.2d at 218, the claim to taxpayer standing that the Seventh Circuit upheld here would have been rejected. The District of Columbia Circuit, unlike the Seventh Circuit, refuses "to recognize taxpayer standing to attack any executive action" simply because it "draws on an outstanding appropriation." *Id.* at 217.

The Second Circuit likewise has hewed to this Court's careful limitations on taxpayer standing. In *In re United States Catholic Conference*, 885 F.2d 1020 (1989), cert. denied, 495 U.S. 918 (1990), the Second Circuit held that taxpayers lacked standing to challenge the IRS's failure to revoke the tax-exempt status of the Catholic Church. The court reasoned that the plaintiffs' asserted injury "center[ed] on an alleged decision made solely by the executive branch," and thus lacked a "nexus * * * [to] Congress' exercise of its taxing and spending power." *Id.* at 1028. In the Second Circuit's view, taxpayer standing requires more than the application or expenditure of governmental resources. That court deems the disbursal of funds pursuant to congressional direction to be critical. "[T]axpayer standing exists to challenge the executive branch's administration of a taxing and spending statute" where "Congress [has] decided how the [Act's] funds were to be spent, and the executive branch, in administering the statute, was merely carrying out Congress' scheme." *Id.* at 1027. Accordingly, the claim of taxpayer standing in the case at hand—which involves no challenge to Congress's exercise of

its taxing and spending power, or to the Executive Branch's distribution of funds pursuant to congressional direction—would have been resolved differently had it arisen within the Second Circuit.

That conflict in the circuits creates a profound disparity in the government's susceptibility to suit at the behest of taxpayers alleging Establishment Clause violations and warrants prompt resolution by this Court.

C. The Question Presented Is Of Fundamental Importance And Warrants This Court's Immediate Review

This is the unusual case where a majority of the judges on the court of appeals have specifically emphasized the need for this Court's review of the question presented. App., *infra*, 59a, 60a, 66a. Proper application of this Court's taxpayer standing precedent is an issue that "is both recurring and difficult." *Id.* at 59a (Easterbrook, J., concurring in the denial of rehearing en banc); see *id.* at 66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc) (explaining that this case raises "an important federal question"). Expansion of taxpayer standing in this fashion threatens a considerable amount of novel litigation. Indeed, within three months of the court's decision here, the Seventh Circuit loosened the reins on taxpayer standing in another respect, holding that it supports suits for equitable restitution against private entities. *Laskowski* v. *Spellings*, 443 F.3d 930 (2006) (as amended on reh'g (July 26, 2006)).[11]

---

[11] Unlike this case—which is focused on executive activities that do not involve the disbursement of funds to private entities—*Laskowski* involved a taxpayer complaint of "direct financial support by the government of religious activities," by means of a specific congressional appropriation of funds to the University of Notre Dame for distribution to other religious colleges. 443 F.3d at 933. The district court dismissed the action as moot because Notre Dame had already received and spent the federal funds at issue. The Seventh Circuit reversed,

As Judge Ripple explained, the rationale adopted by the decision below "makes virtually any executive action subject to taxpayer suit," since "[t]he executive can do nothing without general appropriations from Congress." App., *infra*, 24a. While the majority declined to recognize taxpayer standing to challenge comments in a speech by the Secretary of Education, *id.* at 14a-15a, there is, in Judge Easterbrook's words, no "coherence in * * * a doctrine" that permits taxpayers to challenge executive action that is funded only indirectly through general appropriations, but then attempts to draw lines between the costs of different types of executive action funded by such appropriations. *Id.* at 62a. Creating a coherent *de minimis* limitation on the court of appeals' novel expansion of *Flast* is particularly problematic in light of *Flast*'s grounding in the Remonstrance's prohibition of a mere three-pence of governmental support. See *id.* at 61a-62a ("If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between $0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute); yet the panel draws

---

holding that the recipient of a federal grant may be ordered, at the behest of a private individual, to repay to the U.S. Treasury the grant funds under the doctrine of restitution. As Judge Sykes explained in dissent, "[i]mplicit" in the majority's decision was a determination "that taxpayers have standing to sue a private federal grant recipient for restitution where the government is alleged to have committed an Establishment Clause violation in making or monitoring the grant." *Id.* at 942. "Taxpayer standing under *Flast*," Judge Sykes explained, "has never been understood to encompass such a claim." *Ibid.* The theory of taxpayer standing adopted in this case is, if anything, even further removed from *Flast* than the one in *Laskowski*, because it does not involve any congressional appropriation or grant of federal funds to a private entity and, instead, is limited solely to the Executive's own activities. The Seventh Circuit's decision in *Laskowski* nonetheless underscores the need for this Court to provide further guidance on the jurisdictional limits recognized in *Flast*.

a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece.").

Furthermore, the court of appeals' expansion of taxpayer standing to pursue generalized grievances could render the Seventh Circuit a virtually universal forum for Establishment Clause challenges to Executive Branch action, thereby depriving the government of the protections of other circuits' adherence to this Court's precedent. Due to the national character of most federal governmental activity, anyone nursing a generalized grievance against the federal executive is likely to be able to locate a like-minded taxpayer residing within the Seventh Circuit. Indeed, while the taxpayers in this case reside within the Seventh Circuit, the activities of which they complained spanned the Country. See App., *infra*, 68a-69a paras. 4-9; *id.* at 76a para. 35 (objecting to the content of a presidential speech in Los Angeles); *id.* at 77a para. 42 (challenging activities in Tennessee, Georgia, and Colorado). Accordingly, all it will take to subject the federal government to a taxpayer suit is an objection by one of the more than 11 million federal taxpayers within the Seventh Circuit to executive action on Establishment Clause grounds, regardless of how many other federal taxpayers in other jurisdictions would have had their challenges dismissed out of court.[12]

Finally, review of this case is warranted because it involves an important question of constitutional law concerning the delicate balance of power between the Judicial and Executive Branches. Indeed, as the Court observed last Term, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation

---

[12] United States Census Bureau, *State and Metropolitan Area Data Book: 2006*, at 109, Table A-79 (visited July 28, 2006) <http://www.census.gov/compendia/ smadb/TableA-79.pdf>.

of federal-court jurisdiction to actual cases or controversies," including the standing requirement. *DaimlerChrysler*, 126 S. Ct. at 1861 (internal quotation marks omitted). The Seventh Circuit's unprecedented expansion of taxpayer standing "has serious implications for judicial governance," App., *infra*, 63a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc), and threatens the very accretion of judicial power against which this Court's taxpayer standing cases have consistently guarded. The Executive Branch's constitutionally rooted concerns about that alteration in the balance of separated powers merit this Court's considered review. Furthermore, such broad lower court division, both within the Seventh Circuit and between the circuits, on a question that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review." *Id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

GREGORY G. KATSAS
Deputy Assistant Attorney General

PATRICIA A. MILLETT
Assistant to the Solicitor General

ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

AUGUST 2006

APPENDIX A

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL., PLAINTIFFS-APPELLANTS,

v.

ELAINE L. CHAO, SECRETARY OF DEPARTMENT OF LABOR, ET AL., DEFENDANTS-APPELLEES

No. 05-1130

Argued: Sept. 13, 2005.
Decided: Jan. 13, 2006.

Before: POSNER, RIPPLE, and WOOD, Circuit Judges.

POSNER, Circuit Judge.

The question presented by this appeal is whether a taxpayer can ever have standing under Article III of the Constitution to litigate an alleged violation of the First Amendment's establishment clause unless Congress has earmarked money for the program or activity that is challenged. The district judge thought not, and would have been correct in his thinking under an earlier view of Article III's limitation of the federal judicial power to deciding "Cases" and "Controversies." It was once thought that these terms (which "are, for all intents and purposes, synonymous," *Jones v. Griffith*, 870 F.2d 1363, 1366 (7th Cir. 1989)) limited federal jurisdiction to cases in which the plaintiff alleged the kind of injury that would have supported a lawsuit in the eighteenth century. In the words of Justice Frankfurter, "Both by what they said and by what they im-

plied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.' . . . Even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law." *Coleman v. Miller*, 307 U.S. 433, 460, 59 S. Ct. 972, 83 L.Ed. 1385 (1939) (concurring opinion).

In line with Justice Frankfurter's thinking, *Doremus v. Board of Education*, 342 U.S. 429, 433-34, 72 S. Ct. 394, 96 L.Ed. 475 (1952), rejected taxpayer standing as inconsistent with Article III, cf. *Frothingham v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L.Ed. 1078 (1923), though a taxpayer could sue in state court to enforce his federal right if the state didn't impose as rigorous a standing requirement as Article III does. See, e.g., *Appleton v. Menasha*, 142 Wis.2d 870, 419 N.W.2d 249, 252-53 (1988). The tangible harm to the taxpayer complaining of the expenditure was too attenuated to satisfy eighteenth-century notions of standing embodied in Article III. Indeed, the tangible harm would often be zero because if the complained-of expenditure was enjoined, the money would probably be used to defray some other public expense that would not benefit the taxpayer, rather than returned to him in the form of a lower tax rate.

Notions of standing have changed in ways to induce apoplexy in an eighteenth-century lawyer. For example, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999), upheld standing to challenge the use of statistical sampling for the decennial census; the mere "threat of vote dilution" as a result of the methodology was deemed sufficiently concrete, actual, and imminent to confer standing. *Federal Election Commission v. Akins*, 524 U.S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998), upheld standing to sue for lists of donors to political action committees, on the ground "that the information would help [the committees] (and others to whom they would communicate it) to evaluate candidates for public office." *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion), upheld the standing of voters who lived in newly created majority-minority congressional districts to challenge them as racially gerrymandered on the ground that such districting denied them equal treatment. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), assumed (without discussion) that there was taxpayer and voter standing to challenge a state constitutional amendment that provided that no candidate could be on the ballot who had already served either three terms in the House of Representatives or two terms in the Senate.

And with specific reference to the establishment clause, consider our decision in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 267-69 (7th Cir. 1986), where we considered how much (or rather how little) injury is required to establish conventional (not even taxpayer) standing in an establishment-clause case. We thought it enough that the plaintiffs,

who objected to the prominent display of a cross on public property at Christmas time, had "been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use," in order to avoid having to see the cross. *Id.* at 268. "The curtailment of their use of public rights of way" was injury enough to support their suit. *Id.* In reaching this conclusion we relied on *Abington School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), where the Supreme Court had held that schoolchildren and their parents had standing to complain that the reading of the Bible and the recitation of the Lord's Prayer in the public school that the children attended violated the establishment clause. The specific injury to the plaintiffs could have been averted by the parents' taking their children out of the public school and putting them in a secular private school (or by moving to another public school district), but those options did not deprive the plaintiffs of standing because it was an injury to them to take their children out of the public school, just as it was an injury to the plaintiffs in the *St. Charles* case that they had to detour to avoid the direct effect on them of the alleged violation (in effect, to mitigate their damages). No such ground of standing is claimed here, however; it is taxpayer standing or nothing for these plaintiffs.

It was not long after *Schempp* that the Supreme Court decided *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), in favor of a taxpayer challenge in federal court to an alleged violation of the establishment clause. Congress had appropriated money for grants of financial assistance to private as well as public schools, and the plaintiffs complained that insofar as some of the grants had been made to paro-

chial schools, the statute violated the establishment clause. The Court interpreted *Frothingham* and *Doremus* as having rested not on Article III—not on the notion that the injury that a taxpayer sustains if his taxes are used for a purpose offensive to him is too slight (in the Frankfurterian originalist conception) to sustain a case or controversy in the Article III sense—but rather on what have come to be called the "prudential" principles of standing. These are judge-made principles illustrated by *Warth v. Seldin*, 422 U.S. 490, 509, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), that deny standing to someone who has been injured as a result of the defendant's conduct (the core standing requirement of Article III) but who is not the "right" person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation.

An example of the prudential limitations on standing is the judge-made "indirect purchaser" doctrine of antitrust law that denies a right of action to a purchaser from a purchaser from a cartel. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). If as is highly likely a purchaser from the cartel (the "direct purchaser") passes on a portion of the cartel overcharge to his customers (the "indirect purchasers" from the cartel), the latter are injured and an award of damages would redress their injury. So there would be Article III standing. But to allow them to sue would greatly complicate litigation, first because the court would have to determine how much of the overcharge had been passed on, a difficult question of incidence analysis, and second because there would be tiers of plaintiffs complaining about the same violation of law.

But the prudential principles of standing, like other common law principles, are protean and mutable (the term "prudential" is the very antithesis of a definite rule or standard). The Court decided in *Flast* that they should not stand in the way of challenges to "exercises of congressional power under the taxing and spending clauses of Art. I, § 8, of the Constitution," provided that the expenditure complained of is not just "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" and that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U.S. at 102-03, 88 S. Ct. 1942. The Court found that this two-part test was satisfied by a challenge to the use of "the taxing and spending power . . . to favor one religion over another or to support religion in general." *Id.* at 103, 88 S. Ct. 1942.

The word "specific" in the passage we quoted from *Flast* turned out to be critical to the Court's later reasoning. By forbidding Congress to establish a national church, the establishment clause places a specific limitation on congressional appropriations, since the essence of an establishment of religion is government financial support. *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) ("for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"); see also *Engel v. Vitale*, 370 U.S. 421, 430-31, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). In *Valley Forge Christian College v. Americans United for Separation of*

Church & State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), we learn that a taxpayer has standing to complain *only* about the violation of a limitation on Congress's power under Article I, section 8, of the Constitution to tax and (implicitly) to spend money to finance the exercise of the various powers granted to Congress by Article I. Taxpayers challenged the donation of a disused army hospital by a federal executive agency to a religious institution. The Court denied them standing because the transfer had not been made by Congress or pursuant to an exercise of Congress's taxing and spending powers; it had been made (by the agency) pursuant to Congress's power under Article IV, section 3, to dispose of U.S. property. *Id.* at 479-80, 102 S. Ct. 752.

To complete the edifice, *Bowen v. Kendrick*, 487 U.S. 589, 618-20, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), held that taxpayers had standing to challenge grants by a federal agency to religious institutions pursuant to a statute that authorized grants to public and private institutions for services related to adolescents' sexual problems, even though the grants had not been made by Congress itself. *Kendrick* was a replay of *Flast*, where the complaint had been not about the statute itself, which said nothing about religion (there was such a complaint in *Kendrick* but the part of the Court's opinion dealing with that complaint does not relate to our case), but about the fact that in administering the statute the executive branch had made grants to religious institutions. Consistent with *Flast*, *Kendrick* reads *Valley Forge* as not requiring taxpayers to show that a statute violated the establishment clause; all they had to show was that a statute enacted pursuant to Congress's taxing and spending powers under Article I,

section 8 had been necessary for the violation to occur—it did not have to be sufficient. The violation was not completed until the executive branch acted, but the taxpayers still had standing to challenge it.

In *Valley Forge* the executive branch had simply given away surplus property, and while the property had probably been built or acquired with appropriated funds rather than donated to the government, the Court did not treat the transfer as an expenditure of appropriated funds. Similarly, in *In re United States Catholic Conference*, 885 F.2d 1020, 1027-28 (2d Cir. 1989), where standing to challenge the Internal Revenue Service's grant of a tax exemption to the Catholic Church was denied, there was no expenditure of appropriated funds and no challenge to the exercise of Congress's taxing and spending powers. Cf. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L. Ed. 2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 3-4 (D.C. Cir. 1988).

The present case, however, is governed by *Kendrick*. The taxpayers here are complaining about the use of money appropriated by Congress under Article I, section 8, to fund conferences that various executive-branch agencies hold to promote President Bush's "Faith-Based and Community Initiatives." This is a program that the President has created by a series of executive orders. One order established an Office of Faith-Based and Community Initiatives in the White House. Others established Centers for Faith-Based and Community Initiatives in the various federal departments.

The stated goal of the conferences is to promote community organizations whether secular or religious, as explained in the conferences' website (www. dtiassociates.com/FBCI/):

> For years, faith-based and community groups have been assisting people in need. Unfortunately, the Federal government has often not been a willing partner to these groups in the provision of social services. President Bush has worked to change this. Since he took office, thousands of grassroots organizations have received training in the Federal grants process, and hundreds of these groups have successfully competed for Federal funds for the first time. The White House will host a new round of Conferences on Faith-Based and Community Initiatives to continue supporting the work of effective social service programs. The conferences will provide participants with information about the Federal funding process, available funding opportunities, and the requirements that come with the receipt of Federal funds. The conferences will also provide an opportunity to inform State and local officials about equal treatment regulations and other central elements of the Faith-Based and Community Initiative. The conferences will be supported by the Departments of Justice, Agriculture, Labor, Health and Human Services, Housing and Urban Development, Education, Commerce, and Veterans Affairs, the Small Business Administration, and the Agency for International Development.

The plaintiffs claim that in fact the conferences are designed to promote religious community organizations over secular ones.

The complaint—all we have to go on at this stage—is wordy, vague, and in places frivolous, as where it insinuates that the President is violating the establishment clause by "tout[ing] the allegedly unique capacity of faith-based organizations to provide effective social services"—as if the President were not entitled to express his opinion about such organizations. But the complaint is not entirely frivolous, for it portrays the conferences organized by the various Centers as propaganda vehicles for religion, and should this be proved one could not dismiss the possibility that the defendants are violating the establishment clause, because it has been interpreted to require that the government be neutral between religion and irreligion as well as between sects. *McCreary County v. American Civil Liberties Union of Kentucky*, —— U.S. ——, —— - ——, 125 S. Ct. 2722, 2733-34, 162 L. Ed. 2d 729 (2005); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-17, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989). Neutrality goes both ways; if the government merely wants to redress discrimination against religious providers of social services, it is not violating the establishment clause. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 839, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984); *Linnemeir v. Board of Trustees of Purdue University*, 260 F.3d 757, 765 (7th Cir. 2001). But these are the issues on the merits; the only question before us is the plaintiffs' standing to litigate the merits.

At argument the plaintiffs' counsel was unable to identify the appropriations that fund the conferences.

The complaint does, however, allege that the conferences are funded by money derived from appropriations, which means from exercises of Congress's spending power rather than from, say, voluntary donations by private citizens. There is no suggestion that these are appropriations earmarked for these conferences, or for any other activities of the various Faith-Based and Community Initiatives programs, or for a statute pursuant to which the programs were created. The money must come from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power, of the departments that sponsor the conferences. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2853, 3115-16, 3136, 3150, 3311-12; Department of Homeland Security Appropriations Act, 2005, Pub. L. No. 108-334, 118 Stat. 1298-99.

The difference, then, between this case on the one hand and *Flast* and *Kendrick* on the other is that the expenditures in those cases were pursuant to specific congressional grant programs, while in this case there is no statutory program, just the general "program" of appropriating some money to executive-branch departments without strings attached. The difference cannot be controlling. Suppose the Secretary of Homeland Security, who has unearmarked funds in his budget, decided to build a mosque and pay an Imam a salary to preach in it because the Secretary believed that federal financial assistance to Islam would reduce the likelihood of Islamist terrorism in the United States. No doubt so elaborate, so public, a subvention of religion would give rise to standing to sue on other grounds, just as in the St. Charles cross case; taxpayer standing

in the hypothetical mosque case would not be essential to enabling a suit to be brought in federal court to challenge the violation of the establishment clause. But it would be too much of a paradox to recognize taxpayer standing only in cases in which the violation of the establishment clause was so slight or furtive that no other basis of standing could be found, and to deny it in the more serious cases.

At the other extreme, the fact that almost all executive branch activity is funded by appropriations does not confer standing to challenge violations of the establishment clause that do not involve expenditures. Imagine a suit complaining that the President was violating the clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero. But in the hypothetical case of the mosque, and in the real though much less dramatic case before us, the objection is to a program for which money undoubtedly is "appropriated," albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly.

The government asks us to shift the line so that it runs not between the Presidential (or other official) speech and a Presidential initiative (the conferences), but between the speech and the initiative, on the one

hand, and grants made pursuant to the initiative, on the other hand. The conferences are concerned in part with instructing the attendants on how to apply for government grants for their religious organizations; but the challenge that is before us is not to the grants but to the conferences. The line proposed by the government (no standing to challenge the conferences, standing to challenge the grants) would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause (which despite its wording applies to executive as well as congressional action, *American Civil Liberties Union of Illinois v. City of St. Charles*, *supra*, 794 F.2d at 270) without making outright grants to religious organizations. For the government to operate a mosque or other place of worship would not involve a grant unless a contractor was involved.

We are mindful that the Court in *Flast* carved an exception for "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast v. Cohen*, *supra*, 392 U.S. at 102, 88 S. Ct. 1942. We may put to one side "regulatory" and focus on "incidental." That is a relative term. Whether an expenditure is incidental depends on what it is deemed incidental to. Every government expenditure could be thought incidental to the great goal of the public welfare, a pursuit that costs the federal government some $2 trillion a year, to which the cost of a mosque would certainly be incidental. The Department of Homeland Security alone has a budget of more than $30 billion, compared to which the funds required for the construction of a mosque would be small—and therefore "incidental"? The religiously oriented programs challenged in *Kendrick* were incidental to the goal of solving

problems of adolescent sexuality, but this did not negate taxpayer standing. If the conferences at issue in this case are, as the plaintiffs charge, intended to promote religion, the fact that their cost is slight relative to the budgets of the various departments that sponsor them does not make that cost incidental. Otherwise, indeed, there would be no federal taxpayer standing in any case.

The word "incidental" in *Flast* should be reserved for such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion. Or to the government's expenditure on processing the Catholic Church's application in *In re United States Catholic Conference*, *supra*, for a tax exemption. So while it is true that the executive branch would quickly grind to a halt without general budget appropriations from Congress, our analysis, tracking *Kendrick*, would not permit an individual citizen to challenge just any action of the executive with which he disagrees as a violation of the establishment clause.

The hypothetical case of standing to challenge a Presidential speech extolling religion turns out not to be entirely hypothetical. One of the defendants in this case is a former Secretary of Education, Rod Paige, whom the plaintiffs accuse not of sponsoring or administering conferences under the President's Faith-Based and Community Initiatives program but of having given a speech at one of them in which he said that "President Bush does this because he knows first-hand the power of faith to change lives—from the inside out. And the reason he knows this is because faith changed his life." The district judge was right to rule that the

plaintiffs had no standing to sue Paige because of that remark, just as he was right to rule, in a part of the case not before us, that the plaintiffs do have standing to challenge actual grants made to faith-based organizations pursuant to the President's initiative. (The judge went on to dispose of that phase of the case on summary judgment, but the appeal does not challenge his disposition.)

We must consider finally the bearing of a line of cases, illustrated by *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), and *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 217-19 (D.C. Cir. 1976), in which taxpayer standing to enforce provisions of the Constitution other than the establishment clause was rejected. The *Public Citizen* suit complained that federal employees were illegally assisting in President Nixon's reelection campaign. The court rejected "taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight is a function of Congress . . . . When what is involved is expenditures in implementation of a regulatory statute, or mere executive activity that entails some expenditures, there is no . . . arrow aimed at taxpayers as a class, but an activity of concern to the public at large." Federal employees employed in programs of unquestioned constitutionality cannot be sued by taxpayers simply because they divert some of their work time to improper purposes—just as the President

could not be sued for a speech extolling religion even in the unlikely event that the speech violated the establishment clause.

So if the plaintiffs acknowledged the underlying constitutionality of the Faith-Based and Community Initiatives program, the fact that government employees involved in the program sometimes wandered out of the neutral zone would not confer standing to sue. But since the program itself is challenged as unconstitutional, the fact that it was funded out of general rather than earmarked appropriations—that it was an executive rather than a congressional program—does not deprive taxpayers of standing to challenge it. Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order. We therefore vacate the judgment and remand the case for a determination of the merits of those claims that we have determined the plaintiffs have standing to litigate.

VACATED and REMANDED, WITH DIRECTIONS.

RIPPLE, Circuit Judge, dissenting.

Today, the panel majority holds that executive conduct alleged to have violated the Establishment Clause may be challenged by federal taxpayers so long as that conduct was financed in some manner by a congressional appropriation. Because I do not believe that the applicable Supreme Court precedent permits such a dramatic expansion of current standing doctrine, I respectfully dissent.

The modern doctrine of constitutional standing was hardborn and has endured a difficult adolescence. It

has now reached a stage of maturity, however, where several milestones in its growth have become important and well-established doctrine firmly ingrained in the Nation's jurisprudence. As an intermediate appellate court, we cannot ignore or treat as malleable what the Supreme Court has mandated.

The first of these principles is the Court's insistence that the core factors in the doctrine of standing are not simply prudential matters of judicial restraint but constitutional requirements rooted firmly in the Case and Controversy Clause of the Third Article of the Constitution. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (internal quotations and citations omitted); *see also Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). It is the first of these requirements-the need for a concrete injury—that must be the focus of our inquiry in this case. This "irreducible constitutional minimum" has required that the traditional formula for taxpayer standing, articulated by Chief Justice Warren in *Flast v. Cohen*, 392 U.S. 83, 102-03, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), be construed with "rigor." *Valley Forge Coll.*, 454 U.S. at 481, 102 S. Ct. 752. That formula requires that the federal taxpayer establish a logical link between his status as a taxpayer and the type of legislative enactment attacked, which for taxpayers can be only an exercise of the congressional power under

the Taxing and Spending Clause of Article I, § 8 of the Constitution. It also requires that the taxpayer establish a nexus between his status as a taxpayer and the precise nature of the constitutional infringement alleged. *Flast* at 102, 88 S. Ct. 1942. It is undisputed that the question before us requires that we focus on the first of these requirements and ask whether the plaintiffs have, in the allegations of their complaint, set forth with sufficient rigor a nexus between their status as taxpayers and an exercise of the congressional power under the Taxing and Spending Clause.

Before turning to a definitive answer to that question, we should pause for a moment and reflect on why the Supreme Court requires that we examine this assertion of nexus so rigorously. Taxpayer standing "pushes the envelop" on traditional notions of constitutional standing. Ever since *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923), the specter of a citizen bringing a lawsuit in a federal court to rectify an undifferentiated injury has loomed prominently over the development of our standing jurisprudence. Any assertion of taxpayer standing comes close, dangerously close, to becoming such a case. A lawsuit based on such undifferentiated injury—a mere disagreement with the government policy—is hardly the case and controversy within the jurisdiction of the federal courts.

When the Supreme Court has been called upon to examine this first prong of the *Flast* analysis, its decisions so far have been grounded on the fact that the complaint really did not present a grievance linked to the Taxing and Spending Clause, but instead based on another constitutional provision. Therefore, in *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L.

Ed. 2d 678 (1974), the Court rejected the assertion of taxpayer standing over a suit based on the Accounts Clause. Again in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), the Court refused taxpayer standing to an individual who asserted a violation of the Incompatibility Clause. In *Valley Forge*, the Court similarly decided that a taxpayer suit that implicated the Property Clause, not the Taxing and Spending Clause, could not be maintained.

In this case, the gravamen of the plaintiffs' complaint is of course based on the Establishment Clause, a specific restriction on Congress' power to spend. But is it based on an exercise of the Taxing and Spending Clause? The plaintiffs ask that we answer that question in the affirmative because organizing and conducting the meetings in question involved the expenditure of government funds; the Government replies that the only funds involved are those made available to the President for the operation of his executive office. In its view, specific legislative expenditure under the taxing and spending power is simply not at stake. Rather, the object of the plaintiffs' complaint is the decision of the President to use the funds to conduct these meetings.

My colleagues take the view that, if a taxpayer can challenge the expenditure of government funds under a specific appropriation, they ought to be able to question an expenditure under a general appropriation as well. In my view, this approach, while possessing an initial appeal, simply cuts the concept of taxpayer standing loose from its moorings. The Court's post-*Flast* holdings make it clear that taxpayer standing survives as a narrow exception to *Schlesinger*, *Richardson* and *Wright*' s ban on generalized grievances. It has sur-

vived, even on those narrow terms, only because of the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion. *See Flast*, 392 U.S. at 103, 88 S. Ct. 1942. Beneficiaries of such spending have no incentive to sue, and non-beneficiary outsiders cannot show a direct injury. *Flast* allows standing in these cases so that tax- and expenditure-based violations of the Establishment Clause do not go unremedied. The Supreme Court has made the judgment that the values embodied in the Case and Controversy Clause—separation of powers and the adversary process[1] —are sufficiently protected when a taxpayer makes a specific objection linked to a specific exercise of the taxing and spending power on the ground that it violates the Establishment Clause.

Indeed, a good illustration of *Flast* 's limited purpose is the part of this case, no longer part of this appeal, in which Freedom from Religion challenged specific grants that it alleged were distributed preferentially to religious organizations under the government's faith-based programs. One of these grant programs was "Mentoring Children of Prisoners," established by Congress in the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, 115 Stat.

---

[1] See *Flast* v. *Cohen*, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) ("Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.")

2414 (2002). The program's purpose was to provide support for children with incarcerated parents, and it expressly made eligible for funding faith- and community-based organizations. An organization called MentorKids USA applied for and received a grant under the congressional program. With its stated mission to "exalt the Lord Jesus Christ as the Son of God," MentorKids hired only Christians as mentors, and required its mentors to give monthly reports on the progression of their mentee's "relationship with God." R.53 at 9-10. On the allegation that Congress had made public funds available to MentorKids, the district court, quite properly, allowed taxpayer standing to challenge the grant.

Without the *Flast* exception, it is unlikely that anyone would have had standing to sue in such a situation. Certainly, MentorKids was not going to challenge the grant it received. Similarly, non-sectarian community groups who applied for, but were denied a grant under the same program, would not have been able to satisfy the injury-in-fact and redressibility requirements of conventional standing doctrine; their injury would have been indirect and their allegations that they would have received funding but for the preferential treatment of religious groups would have been too speculative.[2] Fi-

---

[2] *Cf. Allen v. Wright*, 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (holding that parents lacked standing to challenge tax-exempt status of discriminatory private schools because it was too "speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 48 L. Ed. 2d 450 (1976) (denying standing to challenge the tax-exempt status of hospitals who refused care to indigents because the injury to plaintiffs was highly indirect and "result[ed] from the independent action of some third party not before the court"). Likewise, as the Court pointed out in *Warth v.*

nally, an individual plaintiff who came into direct contact with MentorKids and was offended by the group's religious message could not sue for violation of the Establishment Clause because MentorKids is not a state actor. *Flast*, therefore, remains necessary to allow challenges to situations in which Congress makes no public endorsement of religion but nevertheless supports a sectarian cause through the transfer of public funds. *See Flast*, 392 U.S. at 103, 88 S. Ct. 1942 ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."); *see also, e.g., Pulido v. Bennett*, 860 F.2d 296, 297 (8th Cir. 1988) (allowing taxpayer standing to bring an establishment clause challenge against a spending program that channeled funding to parochial schools).

Because the *Flast* exception serves such a narrow purpose, its application has been confined to its express terms. After *Schlesinger*, *Richardson* and *Valley Forge*, to earn taxpayer standing a plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power; focus on a program originating in the executive branch will not suffice. *See Valley Forge*, 454 U.S. at 479, 102 S.Ct. 752 ("*Flast* limited taxpayer standing to challenges directed only at exercises of congressional power") (internal quotation marks and alterations omitted); *Schlesinger*, 418 U.S. at 228, 94 S. Ct. 2925 (denying standing because the taxpayer plaintiffs "did not

---

Seldin, "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III." 422 U.S. 490, 505, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch").

Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), did not alter the strictures on taxpayer standing. In *Bowen*, the Court upheld taxpayer standing to lodge an Establishment Clause challenge against the Adolescent Family Life Act ("AFLA"), a congressional spending program whose administration was delegated to the Secretary of Health and Human Services. Rejecting the Secretary's argument that funds were distributed by an executive branch agency rather than by Congress, the Court observed that "[t]he AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate." *Id.* at 619-20, 108 S. Ct. 2562. That executive officials had been delegated the actual authority to write the checks did not matter. *Id.* at 619, 108 S. Ct. 2562 ("We do not think . . . that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary."). The touchstone of the *Flast* inquiry, according to *Bowen*, was whether the Secretary had been "given authority under the challenged statute to administer the spending program that *Congress had created*." *Id.* (emphasis added).

I cannot accept my colleagues' contention that *Bowen* broadens taxpayer standing so that it is sufficient for plaintiffs to show merely that a congressional appropriations statute enabled the executive branch to vio-

late the Establishment Clause. Such a standard makes virtually any executive action subject to taxpayer suit. The executive can do nothing without general budget appropriations from Congress and the approach of my colleagues will permit an individual citizen to challenge any action of the executive with which he disagrees, as violative of the Establishment Clause. *Bowen* simply did not sanction such a judicial intrusion into the affairs of the executive at the request of an individual who can assert no specific connection between his status as a taxpayer and the executive decision. *See Bowen*, 487 U.S. at 620, 108 S. Ct. 2562 ("In this litigation there is still a sufficient nexus between the taxpayer's standing as taxpayer and the congressional exercise of taxing and spending power . . . ."). In short, my colleagues expand the narrow concept of taxpayer standing to the point where it cannot be distinguished from the citizen standing that the Supreme Court has regarded, throughout the development of the modern standing doctrine, as destructive of the case and controversy limitation on the power of the federal courts to intrude into the decision-making prerogatives of the executive branch.

The majority's position sets this circuit on a course different from that of the other courts to have applied the *Flast* exception after *Bowen*. The Court of Appeals for the District of Columbia Circuit, when asked by municipal taxpayers to prohibit the District of Columbia from expending public funds to oppose citizens' initiatives, observed that the "[Supreme] Court has never recognized federal taxpayer standing outside [of *Flast's*] narrow facts, and it has refused to extend Flast to exercises of executive power." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 3-4

(D.C. Cir. 1988) (citations omitted). Similarly, in *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), the Court of Appeals for the Second Circuit denied taxpayer standing to pro-choice supporters who alleged that the IRS, by granting tax-exempt status to the Catholic church, had violated the Establishment Clause. The court reasoned:

> Plaintiffs in the instant case do not challenge Congress' exercise of its taxing and spending power as embodied in § 501(c)(3) of the [Tax] Code; they do not contend that the Code favors the Church. . . . Instead, they argue that the IRS, in allegedly closing its eyes to violations by the Church, is disregarding the Code's mandate and the Constitution. The complaint centers on an alleged decision made solely by the executive branch that in plaintiffs' view directly contravenes Congress' aim. The instant case is therefore distinguishable from [*Bowen v. Kendrick*]. In that case, there was "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." *Kendrick*, 108 S. Ct. at 2580. Here, there is no nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending power. Hence, *Kendrick* does not alter the requirements of taxpayer standing to allow the instant plaintiffs to challenge how the IRS administers the Code.

Id. at 1028. In short, the Second Circuit squarely held that the alleged *executive branch misapplication* of a statutory tax exemption enacted by Congress under its Taxing and Spending Power is, under prevailing Supreme Court precedent, insufficient to support tax-

payer standing. Like an arguably illegal executive expenditure (like the one alleged in this case), the misapplication of a tax exemption impacts the congressional policy decision embodied in the statute. It is not, however, an attack on Congress' exercise of the Taxing and Spending Power.

As these cases demonstrate, our sister circuits have refused to interpret *Bowen* as affording taxpayer standing based simply upon a showing that a statute enabled the executive branch to violate the Establishment Clause. This circuit ought to follow the same course and, in the process, adhere to the principles set forth in the Supreme Court's case law. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 04-C-381-S

FREEDOM FROM RELIGION FOUNDATION, INC. ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, AND DAN BAKER, PLAINTIFFS

v.

JIM TOWEY, PATRICK PURTILL, BRENT ORRELL, BOBBY POLITO, RYAN STREETER, JOHN PORTER, JULIETE MCCARTHY, LINDA SHOVLAIN, DAVID CAPRARA, ELAINE CHAO, TOMMY THOMPSON, ROD PAIGE, JOHN ASHCROFT, AND DR. JULIE GERBERDING, DEFENDANTS

MEMORANDUM AND ORDER

Plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker commenced this civil rights action in their capacity as taxpayers alleging violations of the Establishment Clause of the First Amendment and seeking declaratory and injunctive relief against defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain,[1] David Caprara, Elaine Chao, Tommy Thomp-

---

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), defendant Linda Shovlain, the current Director of the Agency for International

son, Rod Paige, John Ashcroft, and Dr. Julie Gerberding. Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on defendants' partial motion to dismiss. The following facts are undisputed for the purposes of this motion.

BACKGROUND

Plaintiff Freedom from Religion Foundation, Inc. (FFRF) is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. FFRF has more than 5,000 members who oppose government endorsement of religion in violation of the Establishment Clause, U.S. Const. amend. I. Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor and Dan Baker are federal taxpayers and members of FFRF.

Defendant Elaine Chao is Secretary of the Department of Labor. Defendant Tommy Thompson is Secretary of the Department of Health and Human Services. Defendant Rod Paige is Secretary of the Department of Education. Defendant John Ashcroft is Attorney General and head of the Department of Justice. Defendant Dr. Julie Gerberding is Director of the Centers for Disease Control & Prevention.

Shortly after taking office President George W. Bush launched his Faith-Based and Community Initiative through a series of Executive Orders. *E.g.*, Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002). To assist the President in implementing this Initiative he created an office within the White House called the Office of Faith-Based and Community Initiatives (OFBCI). Exec. Order No. 13,199, 66 Fed. Reg. 8,499

Development Center for Faith-Based and Community Initiatives, is substituted for former director Michael Magan.

(Jan. 29, 2001). The President selected defendant Jim Towey to be Director of the White House OFBCI.

The President also issued a series of Executive Orders directing several Executive Branch agencies to establish Centers for Faith-Based and Community Initiatives to coordinate the President's Initiative within those agencies. Executive Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 13, 2001) (Justice, Education, Labor, Health & Human Services, Housing & Urban Development); Executive Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 16, 2002) (Agriculture, Agency for International Development); *see also* Executive Order No. 13,331, §§ 2(d), (3(b)(iii), 69 Fed. Reg. 9,911 (March 3, 2004) (assigning Faith-Based and Community Initiative coordinating role to the Chief Executive Officer of the Corporation for National and Community Service).

Defendant Patrick Purtill is the Director of the Department of Justice Center for Faith-Based and Community Initiatives. Defendant Bobby Polito is the Director of the Department of Health & Human Services Center for Faith-Based and Community Initiatives. Defendant Ryan Streeter is the Director of the Department of Housing & Urban Development Center for Faith-Based and Community Initiatives. Defendant John Potter is the Director of the Department of Education Center for Faith-Based and Community Initiatives. Defendant Juliete McCarthy is the Director of the Department of Agriculture Center for Faith-Based and Community Initiatives. Defendant Brent Orrell is the Director of the Department of Labor Center for Faith-Based and Community Initiatives. Defendant Linda Shovlain is the Director of the Agency for International Development Center for Faith-Based and Community Initiatives. Defendant David Caprara

is the Director of the Corporation for National and Community Service.

Plaintiffs allege in their amended complaint that the activities of defendants on behalf of the White House OFBCI and the agency Centers for Faith-Based and Community Initiatives are funded by Congressional budge appropriations made pursuant to Congress's Taxing and Spending authority, U.S. Const. art. I, § 8. Plaintiffs allege that in the course [of] implementing the President's Initiative defendants have used "Congressional taxpayer appropriations" in conducting certain activities to endorse and advance religion in violation of the Establishment Clause.

MEMORANDUM

Presently before the Court is defendants' motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige. Defendants argue that plaintiffs have failed to demonstrate standing to pursue claims against these defendants. Plaintiffs rely on their status as federal taxpayers as the sole basis for standing.

Article III of the Constitution confines the exercise of federal judicial power to actual "cases" and "controversies." For plaintiffs to satisfy the case-or-controversy requirement of Article III, which is the "irreducible constitutional minimum" of standing, they must demonstrate that they have suffered an injury in fact, that the injury is fairly traceable to the actions of defendants, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

As a general rule, a litigant's status as a federal taxpayer is insufficient to convey standing to challenge federal expenditures because his or her "interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

In *Flast v. Cohen*, the United States Supreme Court recognized an exception to this general rule and established a two-part test that a litigant must satisfy to establish federal taxpayer standing:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. 83, 102-03 (1968). The Court found the second prong to be met in *Flast*, as it is here, because the taxpayers' challenge was based on the Establishment Clause, which the Court found to "operate[] as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.

Defendants argue that plaintiffs' allegations relating to defendants Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara are insufficient to satisfy the first prong of the *Flast* test. Having now had the opportunity to review the parties submissions and the relevant procedents including *Frothingham*, *Flast*, *Valley Forge Christian College v. American United for Separation of Church & State*, 454 U.S. 464 (1982), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court has determined that plaintiffs lack standing to pursue their claims against defendants Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara.

In *Valley Forge*, the United States Supreme Court determined that federal taxpayers lacked standing to bring an Establishment Clause challenge to a conveyance of federal property to a religious institution because the source of the taxpayers' complaint was not congressional action but a decision by an Executive agency to transfer a parcel of federal property. *Valley Forge*, 454 U.S. at 479. The Court construed *Flast* to limit taxpayer standing "to challenges directed only at exercises of congressional power." *Id.* (alterations and internal quotation marks omitted) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)). In *Kendrick*, the Court clarified that the disbursement of federal funds by an Executive agency in

the administration of a congressional program could be challenged consistent with *Flast* where the program was, at its heart, a program of disbursement of funds pursuant to Congress's taxing and spending powers and the taxpayers' claims called into question how the funds authorized by Congress were being disbursed pursuant to the program's statutory mandate. 487 U.S. at 620.

Defendant Towey is Directory of the White House OFBCI. Plaintiffs allege in their complaint that Towey's actions in violation of the Establishment Clause "include the support of national and regional conferences . . . at which conference faith-based organizations are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." Plaintiffs allege that these conferences are "set up and run" by Towey and the Center for Faith-Based and Community Initiatives Director defendants, "and such events are intended to preferentially promote and advocate a climate conductive to funding of faith-based organizations, without similar advocacy for secular community-based organizations."

These allegations are insufficient to establish standing as to Towey. The view that federal taxpayers as such should be permitted to bring Establishment Clause challenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations has never been accepted by a majority of the Supreme Court. The President established the White HOuse OFBCI by Executive Order and funded it with general budget appropriations. Consequently, Towey and his office have no congressional mandate. Rather, he acts at the President's request

and on the President's behalf. Towey is not, as was the case in *Kendrick*, charged with the administration of a congressional program. Consequently, Towey's actions are not "exercises of congressional power" as required by the *Flast* test.

Unlike Towey, the President has located defendants Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara within agencies that administer congressional programs. Like Towey, however, these defendants are not charged with the administration of congressional programs. While these defendants coordinate the President's Initiative within their respective agencies, it is the agency-head defendants who administer the congressional programs. Accordingly, defendants Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara are not proper parties to the plaintiffs' action. Plaintiffs do not have standing to challenge the actions of these defendants because their actions do not represent congressional power as required by the *Flast* test.

Finally, defendants move to dismiss defendant Secretary Rod Paige of the Department of Education. Defendants argue that plaintiffs have not identified or challenged a program administered by Paige in alleged violation of the Establishment Clause. Plaintiffs allege that Paige gave a keynote speech at a White House Conference on Faith-Based and Community Initiatives in October 2002 at which he made statements that gave the appearance of endorsing religion. These statements, however, are too far removed from any congressional action taken pursuant to the taxing and spending clause of Art. I, § 8, of the Constitution to satisfy the *Flast* test. Defendant Paige will be dismissed from plaintiffs' action.

ORDER

IT IS ORDERED that defendants' partial motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige is GRANTED.

Entered this 15th day of November, 2004.

BY THE COURT:

/s/ JOHN C. SHABAZ
JOHN C. SHABAZ
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 04-C-381-S

FREEDOM FROM RELIGION FOUNDATION, INC. ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, AND DAN BAKER, PLAINTIFFS

v.

JIM TOWEY, PATRICK PURTILL, BRENT ORRELL, BOBBY POLITO, RYAN STREETER, JOHN PORTER, JULIETE MCCARTHY, LINDA SHOVLAIN, DAVID CAPRARA, ELAINE CHAO, TOMMY THOMPSON, ROD PAIGE, JOHN ASHCROFT, AND DR. JULIE GERBERDING, DEFENDANTS

MEMORANDUM AND ORDER

Plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker commenced this civil rights action in their capacity as taxpayers alleging violations of the Establishment Clause of the First Amendment and seeking declaratory and injunctive relief against defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara, Elaine Chao, Tommy Thompson, Rod Paige, John Ashcroft, and Dr. Julie Gerberding. Jurisdiction is based on 28 U.S. S. § 1331. By Memorandum and Order dated November 15, 2004 the

Court granted defendants' partial motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige for lack of standing. Thereafter plaintiffs voluntarily dismissed all but two claims relating to programs administered by defendant Thompson. The matter is presently before the Court on plaintiffs' motion for partial summary judgment and defendants' motions to dismiss and for summary judgment. The following facts are not disputed.

BACKGROUND

Plaintiff Freedom from Religion Foundation, Inc. (FFRF) is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. FFRF has more than 5,000 members who oppose government endorsement of religion in violation of the Establishment Clause, U.S. Const. amend. I. Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker are federal taxpayers and members of FFRF.

Defendant Tommy Thompson is Secretary of the Department of Health and Human Services (HHS). The Administration for Children and Families (ACF) is a federal agency located within HHS that administers the Compassion Capital Fund (CCF) program. The CCF program was created to increase the effectiveness of faith-based and community organizations (CFBOs) and enhance their ability to provide social services to those most in need. Social services contemplated by the CCF program include the "promotion treatment and prevention services related to primary health care, substance abuse treatment, mental health treatment, HIV/AIDS and related aspects of public health services directed to low-income families and individuals." HHS

Prog. Announcement No. 2002-14, 67 Fed. Reg. 39,561 (June 7, 2002). The CCF program provides funding to intermediary organizations that work to increase the capabilities of small CFBOs by providing training, technical assistance, and capacity-building sub-awards. ACF invites applications for CCF grants

> from a wide variety of types of organizations or entities that can demonstrate knowledge and experience in the provision of the types of technical assistance described herein to a diverse group [of] faith-based and community-based organizations representing different organizational or religious affiliations. Further, ACF encourages applications from applicants that propose to work with and have experience working with faith- and community-based organizations that historically have not been well served or supported by governmental funds and have the greatest needs.
>
> Nongovernmental organizations, non-profit agencies, including faith-based organizations, public agencies, State and local governments, colleges and universities, and for-profit entities may submit applications under this announcement.

Id. at 39, 5654.

An independent panel of experts in the field reviews eligible CCF grant applications based on specific evaluation criteria designed to assess the proposed project's quality and likelihood of success: (1) the proposed program approach, including technical assistance strategy and plan for issuing sub-awards to diverse FBCOs; (2) the discussion of specific goals of the proposed project and expected benefits; (3) the description of staff that will be involved in implementing the

project and staff members' experience with providing similar support; (4) the needs of FBCOs in the applicant's geographic area and how the proposed project could meet those needs through technical assistance; (5) the description of the geographic area to be served, including whether the area is precisely defined and reasonable; and (6) the proposed budget and justification for the budget. The review panel's assessment is a primary factor in ACF's funding decisions, although ACF is allowed to consider other factors such as geographic diversity and the types of applicant organizations. *Id.* at 39,567-569.

In September 2002 ACF awarded a three-year CCF grant to the Interfaith Health Program with in the Rollins School of Public Health at Emory University. Emory uses the CCF grant to fund its Strong Partners Initiative.

The Strong Partners Initiative creates a partnership between Emory and eight or nine "Strong Partner Foundations" (SPFs). These foundations work with Emory to provide technical assistance and sub-awards to small FBCOs with limited resources. Emory described the origin of these SPFs in a "Sub-Award and Sub-Sub-Award Plan" that is submitted to ACF as follows:

> These foundations were formed when non-profit, ususally religious sponsored, hospitals or other health care assets were sold to for-profit buyers. Substantial portions of the proceeds of these transactions were used by the original sponsors to set up foundations which continue the original missions of the religious sponsors—usually a local variation on

the theme of enhancing the health of the community.

Emory explained in its grant application that it believes these foundations as to be "uniquely positioned" to assist it in advancing the goals of the CCF program:

> The Interfaith Health Strong Partners project draws upon the experience and strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.
>
> These foundations also provide a substantial source of matching funds for federal funds—a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Emory also provides three levels of technical assistance to SPFs and sub-awardees: it helps FBCOs to address specific "internal plumbing" issues within their organization (e.g., bookkeeping and strategic planning), develop evaluative and collaborative skills, and establish events for organizations sharing topics of concern.

Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capac-

ity; (3) it should have a demonstrated ability to collaborate with other FBCOs and community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; and which attempt to engage body/mind/spirit."

In response to a query from Emory's CCF program officer regarding how its selection process is open and competitive, it stated that "each foundation conducts its own open, competitive grant application and selection process." Later in this document, Emory states that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Later still, it described its process as follows:

> Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations include:
>
> 1) Do the selections taken as a whole—some 30+ sub awardee [FBCOs] per year—represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?

2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?

3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

In the first budget period of the grant, SPFs made sub-awards to 19 faith-based organizations and 4 community-based organizations. In the second year, SPFs made sub-awards to 26 faith-based organizations and 5 community-based organizations.

Through the Family and Youth Services Bureau, ACF/HSS also administers the Mentoring Children of Prisoners grant program, which Congress established in the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133. Congress created the Mentoring Children of Prisoners program to provide support for children who face the negative present and future effects of having a parent who is incarcerated. Citing empirical findings that "mentoring is a potent force for improving children's behavior across all risk behaviors affecting health," Congress authorized the Secretary of HSS [*sic*] to make competitive grants to government, tribal, faith-based, and community organizations to facilitate mentoring relationships. *Id.* The program announcement for Mentoring Children of Prisoners grants includes the following statement regarding eligibility for grants:

> Those eligible to apply for funding under this grant competition include faith and community-based organizations, tribal governments or consortia, and state or local governments where sub-

> stantial numbers of children of prisoners live. Applicants must apply to establish new programs or to expand existing programs utilizing a network of public and private community entities to provide mentoring services for children of prisoners. Collaboration among eligible entities is strongly encouraged. All eligible organizations, including faith-based organizations, are eligible to compete on equal footing for Federal financial assistance used to support social service programs. No organization may be discriminated against on the basis of religion in the administration or distribution of Federal financial assistance under social service programs. Faith-based organizations are eligible to compete for Federal financial assistance while retaining their identity, mission, religious references, and governance. However, faith-based organizations that receive funding may not use Federal financial assistance, including funds, to meet any cost-sharing requirements, to support inherently religious activities, such as worship, religious instruction, or prayer. In addition, any participation in these activities by beneficiaries must be voluntary.

HHS Prog. Announcement No. ACYF/FYSB 2003-02, 68 Fed. Reg. 26,622-01, 26,624 (May 16, 2003).

MentorKids USA[1] is a mentoring organization located in Phoenix, Arizona. MentorKids applied for and received a three-year Mentoring Children of Prisoners grant in 2003.

---

[1] Formerly known as MatchPoint of Arizona. Hereinafter, "MentorKids" will be used to refer to both MentorKids and its predecessor MatchPoint.

MentorKids' articles of incorporation state that it was created for specific purposes that include:

> To exalt the Lord Jesus Christ as the Son of God, the Savior of the World and the head of his church. (Matthew 16:13-18, Romans 10:8-11; Ephesians 5:23; Col. 1:15-19);
>
> . . . . [and]
>
> To propagate the gospel of the Lord Jesus Christ, as outlined in the Bible, at home and abroad, by way, of operating and maintaining missions, parsonages, and Christian educational institutions which may offer both religious and secular subjects, Christian camps, and Christian recreational facilities;

MentorKids recruits and hires only Christians as mentors. The MentorKids mentor application requires an essay entitled "Personal Testimony," which "should include your life before Christ, your conversion, and what your life is like now. Your life now should include who Jesus is for you, and how He affects our daily life." The essay also inquires: "Briefly describe how you might be able to share your Christian faith with a youth." Potential mentors receive a "fact sheet" stating that "mentors introduce children to the gospel of Jesus Christ, allowing them to build their lives on the solid foundation of God's love."

MentorKids requires its mentors to adhere to a Christian Statement of Faith and Code of Conduct. The current MentorKids training manual discusses issues including "Understanding the Love of God," "Understanding the Grace of God," and "Understanding God and Jesus as a Man for All People." The manual advises mentors to "pray for your mentee;" "if you are going to help your mentee understand who God is and His love,

you first must know who He is and understand His love;" "share your experience regarding God's grace in your life;" "read, act out or talk about Biblical examples of where Jesus showed grace to people;" "introduce your mentee to the scriptures and point out that John 3:16 states that Jesus is God's redemption plan for *everyone*." Later, the manual advises mentors to "pray and look for opportunities to share your faith. Be bold in speaking the truth of the gospel and sensitive to your mentee's response."

Mentors are required to provide monthly reports to their coordinator that assess whether their mentee "seems to be progressing in relationship with God." The monthly report also asks mentors to address whether their mentee has "discussed God;" participated in Bible Study;" "Attended Church;" or "accepted Christ this month."

In a 2003 memo to case managers, MentorKids' President John Gibson labeled the year as the "year of intentionality." Gibson described MentorKids' mission for the year as follows:

> As the ministry moves forward to a new era of excellence we plan to be much more intentional about introducing the kids in the program to Christ and nurturing their growth and foundation in Him. Note the Miniseries [sic] new Mission Statement: Our mission is to locate, train and empower mentors to be the presence of Christ to kids facing tough life challenges through one-on-one relationships. We pledge to provide the tools for you and your mentors to be equipped to maximize the possibility of the child developing an authentic life-changing relationship with Christ, through relevant bible discipling interphased with life skills. The mentor relationship

> will only last a season—the relationship between the child and their Savior will guide and comfort them every day, and last for eternity."

Similar references permeate MentorKids' website, board meeting minutes (e.g., MentorKids' "number one priority" is "to share the gospel of Jesus Christ with MatchKids so that they have an opportunity to know him"), and newsletters (e.g., "we want to be an intentional ministry; intentionally bringing kids into healthy maturity and a relationship with Jesus Christ").

The Fall 2003 newsletter describes a camp experience provided by MentorKids:

> Camp is designed to forge a lasting bond between our mentors and their kids, explains Program Director Bill Brittain. "In providing a sense of adventure and fun, we break down walls—between mentors and kids and between kids and Jesus. Everything we do during those three days creates an atmosphere which invites spiritual growth and an increased awareness of choices we have in our lives. Our goal is to see every young adult choose Christ—either through a first-time commitment or a deeper on- going relationship with Him. This year, we had six young adults choose Christ for the first time in their lives. That makes the whole camp worth it."

At his deposition, Gibson recognized that mentors are encouraged to expose their faith to mentees and that mentees regularly come to faith in Jesus Christ. He believes that kids who accept Jesus may be more successful in the program; a belief in God makes[s] it more likely that kids will stay out of trouble.

Confronted with this evidence, HSS [*sic*] has now suspended MentorKids' grant. The suspension will not

be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations; and policies.

MEMORANDUM

Defendants have moved for summary judgment on plaintiffs' claim that the HSS [*sic*] grant to Emory University violates the Establishment Clause. Plaintiffs have moved for summary judgment that the HSS grant to MentorKids violates the Establishment Clause. Defendants initially filed a cross-motion relating to the MentorKids grant but then retracted it, suspended the grant, and moved to dismiss citing both Article III and prudential concerns relating to mootness and ripeness. Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Compassion Capital Fund Grant to Emory University

Plaintiffs do not raise a facial challenge to the constitutionality of the CCF program. Instead, they argue that the grant program as applied to Emory University's Strong Partners Initiative violates the Establishment Clause because Emory University and its SPF intermediaries give preferential treatment to religious organizations in their selection of organizations for subawards under the grant.

As a preliminary matter, defendants argue that plaintiffs lack standing to pursue their challenge to the Emory University CCF grant. This argument is unpersuasive. Pursuant to *Bowen v. Kendrick*, 487 U.S. 589 (1988), plaintiffs have standing as taxpayers to challenge the disbursement of federal funds to Emory University by HSS [*sic*] in the administration of the CCF program. The Establishment Clause operates as a specific constitutional limitation upon Congress's exercise of its taxing and spending power. *Flast v. Cohen*, 392 U.S. 83, 104 (1968). At its heart, the CCF program is a program of disbursement of funds pursuant to Congress's taxing and spending powers and plaintiffs' claim calls into question how the funds authorized by Congress are being disbursed pursuant to the program's statutory mandate. *Kendrick*, 487 U.S. at 620; *see also Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001).

Religious freedom is basic to this nation. Many of those who formed this nation or immigrated to it left their homelands to escape religious persecution seeking the right to worship without government interference. The First Amendment to the United States Constitution guarantees this right to worship without government interference by providing that "Congress shall

make no law respecting an establishment of religion." Though there have been a variety of approaches to defining when state action violates the Establishment Clause the heart of the clause is that government, state or federal, should not prefer one religion to another or religion to irreligion. *Freedom From Religion Foundation, Inc. v. Thompson*, 920 F. Supp. 969, 972 (W.D. Wis. 1996) (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994)).

In *Lemon v. Kurtzman*, the United States Supreme Court developed a three-pronged test to determine whether a statute or program complies with the Establishment Clause. 403 U.S. 602 (1971). Under this test, a program does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *Id.* at 612-13. In *Agostini v. Felton*, the Supreme Court modified the *Lemon* test, emphasizing the continuing importance of the first two prongs but determining that entanglement could be considered an aspect of the second prong's "effect" inquiry. 521 U.S. 203, 222-23 (1997).

In *Agostini*, the Court used "three primary criteria" in evaluating whether government aid has the primary effect of advancing religion: whether the statute or program in question "results[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Id.* at 234.

Plaintiffs argue that Emory University and its SPF intermediaries define recipients of sub-awards under the CCF grant by reference to religion, giving preferential treatment to religious organizations. Plaintiffs

allege that this preference occurs at two levels. First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Second, plaintiffs allege that the SPFs give preferential considerations to religious organizations when awarding sub-grants.

Defendants do not dispute for the purpose of summary judgment that the exercise of such a preference would violate the Establishment Clause, as well as HHS regulations:

> Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government and other intermediate organizations receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, "program" refers to activities supported by discretionary grants under which recipients are selected through a competitive process. As used in this section, the term "recipient" means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term "grantee" as used in 45 CFR Parts 74, 92, and 96.

45 C.F.R. § 87.1(b). Defendants argue that plaintiffs have failed to produce any evidence of this alleged preferential treatment. Plaintiffs rely entirely upon the grant record produced by defendants to satisfy their Rule 56(e) obligation to set forth specific facts showing that there is a genuine issue for trial. Plaintiffs have produced no responses to interrogatories, affidavits, or

depositions of individuals with personal knowledge of Emory's or its SPF's alleged exercise of religious preference in awarding sub-grants.

First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Plaintiffs rely solely on the fact that each of the SPFs selected by Emory is a faith-based organization to prove this allegation. Plaintiffs have produced no evidence that Emory relied on religion as a criterion in selecting its SPFs. The grant application provides the only evidence of the criteria relied on by Emory in selecting SPFs:

> The Interfaith Health Strong Partners project draws upon the experience and strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.
>
> These foundations also provide a substantial source of matching funds for federal funds--a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Nothing within this statement or otherwise suggests that Emory selected its SPFs because they were religious organizations.

Second, plaintiffs allege that the SPFs give preferential consideration to religious organizations in their awarding of sub-grants. To prove the existence of this preference, plaintiffs rely on the fact that many (about

80%) of the organizations that received sub-grants from Emory and its SPFs are faith-based organizations. Plaintiffs characterize this as "disproportionate," but they fail to explain why or to provide any evidence that would permit evaluation of this claim. For example, there is no evidence how many faith-based and non-faith-based organizations applied for sub-awards. Moreover, the United States Supreme Court has suggested that Courts decline to engage in the type of analysis that plaintiffs' argument would require:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller v. Allen, 463 U.S. 388, 401 (1983).

Plaintiffs also highlight isolated words and phrases used by Emory in its grant application to describe the type of FBCOs to which it hoped to make sub-awards. These words and phrases (like "holistic" and "body/mind/spirit") cannot be understood reasonably to have any inherently religious content, and plaintiffs have presented no evidence that Emory intended to impart them with religious content.

Finally, plaintiffs focus on one sentence that appears in a document which Emory submitted to HSS [*sic*] when asked to confirm that its selection process is open and competitive. After stating that each of its SPFs "conducts its own open, competitive grant application and selection process," Emory stated that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Plaintiffs rely on the first clause of this sentence to show that there is a genuine issue for trial.

Plaintiffs' speculative interpretation of this one general, ambiguous clause is insufficient to survive summary judgment. Plaintiffs do not dispute that the grant application lists specific criteria which Emory expected SFSs to apply in making sub-awards. Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capacity; (3) it should have a demonstrated ability to collaborate with other FBCOs and community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; and which attempt to engage body/mind/spirit." Within the same document

as plaintiffs' "smoking gun" clause, Emory specifically describes its process as follows:

> Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations includes:
>
> 1) Do the selections taken as a whole—some 30+ sub awardee [FBCOs] per year—represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?
>
> 2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?
>
> 3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

Confronted with these neutral selection criteria, plaintiffs have failed to produce any evidence to corroborate their interpretation of the ambiguous sentence upon which they rely. This one ambiguous sentence, plucked from four hundred pages of grant application records, and plaintiffs' wholly unsubstantiated speculation as to the proper interpretation thereof, are insufficient to demonstrate the existence of a genuine issue of material fact.

Plaintiffs have failed to demonstrate the existence of a genuine issue of material fact as to Emory Univer-

sity's CCF grant. Accordingly, defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment will be granted.

Mentoring Children of Prisoners Grant to MentorKids USA

Plaintiffs move for summary judgment that HSS's Mentoring Children of Prisoners Grant to MentorKids USA violates the Establishment Clause. Plaintiffs argue that the MentorKids program is using the grant to promote religion.

Confronted with the evidence produced by plaintiffs in their motion for summary judgment, defendants acted on December 16, 2004 to suspend further funding of MentroKids' Mentoring Children of Prisoners Grant. Defendants represent that this suspension will not be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations, and policies includeing 45 CFR § 87.1(c):

> Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

Consequently, defendants raise jurisdictional and prudential mootness and ripeness concerns and ask the Court to dismiss plaintiffs' claim relating to the suspended grant.

In general, a defendant's voluntary cessation of a challenged practice does not deprive a federal court of the power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1981). Defendants must bear the heavy burden to prove that there is no reasonable expectation that the wrong will be repeated. *Id.* Defendants have failed to meet this burden, having failed to provide sufficient assurances that the grant will not be reinstated.

Effectively conceding that federal funds have been used by the MentorKids program to advance religion in violation of the Establishment Clause, defendants do not attempt to set forth specific facts to show that there is a genuine issue for trial. Accordingly, plaintiffs are entitled to judgment as a matter of law.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs against defendants declaring that the Mentoring Children of Prisoners grant to MentorKids USA is VACATED and further funding is DENIED as it relates to its present structure.

IT IS FURTHER ORDERED that defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as it relates to the Department of Health and Human Service's Com-

passion Capital Fund Grant to Emory University and is in all other respects DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiffs AFFIRMING the Department of Health and Human Service's Compassion Capital Fund Grant to Emory University.

Entered this 11th day of January, 2005.

BY THE COURT:

/s/ JOHN C. SHABAZ
JOHN C. SHABAZ
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1130
04 C 0381S-

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.
PLAINTIFFS-APPELLANTS

v.

ELAINE L. CHAO, SECRETARY OF DEPARTMENT OF LABOR, ET AL., DEFENDANTS-APPELLEES

May 3, 2006

Appeal from the United States District Court
for the Western District of Wisconsin

ORDER

Before HON. JOEL M. FLAUM, CHIEF JUDGE, HON. RICHARD A. POSNER, HON. FRANK H. EASTERBROOK, HON. KENNETH F. RIPPLE, HON. DANIEL A. MANION, HON. MICHAEL S. KANNE, HON. ILANA DIAMOND ROVNER, HON. DIANE P. WOOD, HON. TERENCE T. EVANS, HON. ANN CLAIRE WILLIAMS, HON. DIANE S. SYKES, Circuit Judges.

On March 13, 2006, defendants-appellees filed a petition for rehearing with suggestion of rehearing *en banc*. A vote of the active members of the Court was requested, and a majority has voted to deny the petition.[1] The petition is therefore DENIED.

FLAUM, Chief Judge, concurring in the denial of rehearing en banc.

Along with Judge Easterbrook, my vote to deny the petition for rehearing en banc is not premised upon a conclusion that the taxpayer standing issue as addressed in the panel opinion is free from doubt. Indeed, the position set forth in the dissent is one which could eventually command high court endorsement. However, the obvious tension which has evolved in this area of jurisprudence, as evidenced by the scholarly opinions of Judge Posner and Judge Ripple, can only be resolved by the Supreme Court. In my judgment, the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation.

EASTERBROOK, Circuit Judge, concurring in the denial of rehearing en banc.

My vote to deny the petition for rehearing en banc does not imply that I deem the panel's resolution beyond dispute or the issue unimportant. To the contrary, the subject is both recurring and difficult, and there is considerable force in Judge Ripple's dissent, 433 F.3d 989, 997-1001 (7th Cir. 2006), and in the

---

[1] Chief Judge Flaum and Judge Easterbrook have written opinions concurring in the denial of the petition for rehearing *en banc*. Judge Ripple has written an opinion, which Judge Manion, Judge Kanne, and Judge Sykes have joined, dissenting from the denial of the petition.

standing analysis of Judge Sykes's dissent from *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), which extends this panel's holding. Two divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further review. My vote to deny rehearing rests on a conclusion that this is not the right forum for that further deliberation.

The principal difficulty with arguments pro and con about taxpayer standing is that the doctrine is arbitrary. Taxpayers lack standing to complain about almost all expenditures. *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), held that taxpayer suits about religious outlays are special but declined to overrule *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923), which holds that taxpayers lack standing to complain about public expenditures. To the extent that the Establishment Clause forbids taxation to support religion, people subject to the illegal levy may obtain relief, but plaintiffs in this litigation do not say that they have paid one extra penny because of the grant. Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful. Article III does not permit courts to entertain such complaints. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Allen v. Wright* 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed.

2d 706 (1974). Cf. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997). Yet *Flast* has so far resisted efforts either to cabin it or to incorporate its approach into a more general framework of justiciability.

Our panel's majority has concluded that the doctrine of taxpayer standing will be more logical if it covers administrative as well as legislative earmarks. I grant that proposition—but comprehensiveness and rationality are not this doctrine's hallmarks. Why may taxpayers complain about outlays of cash but not about a distribution of real or personal property? See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Cash may be exchanged for property or the reverse; a distinction between cash and property for the purpose of standing is illogical but embedded in the cases.

Why may taxpayers complain about modest expenditures (the grant in *Laskowski* was $500,000, or less than a cent per U.S. taxpayer) but not about slightly smaller ones? According to the panel, a complaint that the President used the State of the Union Address to promote religion is not justiciable. The panel dismissed a claim against the Secretary of Education that rested on the expense that the Secretary had incurred to deliver a speech. See 433 F.3d at 995-96. The total cost of presidential proclamations and speeches by Cabinet officers that touch on religion (Thanksgiving and several other holidays) surely exceeds $500,000 annually; it may cost that much to use Air Force One and send a Secret Service detail to a single speaking engagement. If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between

$0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute); yet the panel draws a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece). Where is the coherence in such a doctrine? That no court is willing (yet!) to entertain a suit about a speech that costs $50,000 to draft, deliver, and distribute through the Government Printing Office—while adjudicating objections to $500,000 grants that do not cost the plaintiff even 1¢—suggests problems in *Flast's* underpinning and application.

Perhaps Michael Newdow should have invoked his tax return, rather than his status as a father, to challenge the inclusion of "under God" in the Pledge of Allegiance. What is the price tag in both money and the opportunity cost of time to print many million copies of that phrase and read it daily in thousands of classrooms? As it was, however, the Supreme Court deemed his suit non-justiciable. See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004). But this arbitrariness is built into the doctrine as it comes to us. Nothing we can do would eliminate the tension between *Flast* and *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), on the one hand, and *Frothingham* and *Valley Forge* (plus the many cases such as *Defenders of Wildlife*) on the other. The problem is not of our creation and cannot be resolved locally. There is no logical way to determine the extent of an arbitrary rule. Only the rule's proprietors can bring harmony—whether by extension or contraction—or decide to tolerate the existing state of affairs.

RIPPLE, Circuit Judge, with whom MANION, KANNE and SYKES, Circuit Judges, join, dissenting from the denial of rehearing en banc.

The Government has requested that the court hear this case en banc. Because the decision of the panel majority departs significantly from established Supreme Court precedent and creates an inter-circuit conflict, I believe that the Government's considered request reflects its serious concern about the impact of the panel majority's holding on executive governance. Therefore, I believe that the case should be set for rehearing en banc, and that a decision be rendered that reflects the view of the entire court. Indeed, because this case also reflects a view about the nature of Article III judicial power, the case has serious implications for judicial governance, and we, as officers of that branch, have a special duty to ensure that a decision expanding the authority that we claim for ourselves represents the considered judgment of every judge on this court. Such a review is especially appropriate when the Government specifically charges, as it has here, that the court has "greatly exceeded its authority by ignoring the Supreme Court's own rules . . . and substituting its own views of what the law rationally ought to be." Pet. Reh'g at 13.

The panel majority's opinion does not square with the Supreme Court's taxpayer standing cases beginning with *Flast v. Cohen*, continuing with *Valley Forge Christian College*, and ending most recently with *Bowen v. Kendrick*. In each of these cases, the plaintiffs' claims to taxpayer standing turned on the strength of the nexus demonstrated between their status as taxpayers and the challenged *congressional* expenditure. In *Flast*, taxpayers had shown such a

nexus because they alleged that *Congress* had violated the Establishment Clause by authorizing grants to parochial schools, even though the money passed through an executive agency. *Bowen* found a sufficient taxpayer nexus to challenge the constitutionality of a *congressional* spending program that allowed religious institutions to receive federal funds, even though the program was administered by the Secretary of Health and Human Services. By contrast, *Valley Forge* prohibited taxpayers from halting a purely executive decision to transfer surplus public land to a religious institution. What distinguished the *Valley Forge* plaintiffs from those in *Flast* and *Bowen* was that "the source of their complaint [was] not a congressional action, but a decision by [the executive agency] to transfer a parcel of federal property." *Valley Forge*, 454 U.S. at 479, 102 S. Ct. 752. In short, *Valley Forge* held that the constitutionally-required nexus between a plaintiff's status as taxpayer and "'exercises of congressional power'" erodes without an allegation that *Congress* has violated the Establishment Clause. *Id.* (quoting *Flast*, 392 U.S. at 102, 88 S. Ct. 1942).

Here, as in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress. The plaintiffs never alleged that *Congress* violated the Establishment Clause by appropriating funds. Here, as in *Valley Forge*, there is no allegation that Congress authorized the challenged activities; and, as far as the record reflects, the challenged *executive* action involved no more incidental expenditure than the transfer of public land in *Valley Forge*. Nevertheless, the panel decision held that the plaintiffs had standing because the congressional appropriation was "necessary for the violation to occur," *Freedom from Religion Foundation, Inc.*

v. Chao, 433 F.3d 989, 993 (7th Cir.2006). Some expenditure of governmental funds is necessary for every executive action. That reality is present here as it was present in *Valley Forge*. However, the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing. Abolishing or even diluting a standard so explicitly set by the Supreme Court simply is not an appropriate decision for us to make. We have a duty to apply faithfully the precedent of the Supreme Court until that precedent is overruled by the Supreme Court. *See State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

We also ought to hear this case en banc because the panel majority has created a clear conflict on this issue. Most to the point is *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989). There, the Court of Appeals for the Second Circuit denied taxpayer standing to pro-choice supporters who sought to challenge a decision by the IRS to grant tax-exempt status to the Catholic Church. Critically, as in *Valley Forge* and in this case, the plaintiffs had not asserted that Congress wrote the Internal Revenue Code in a manner that favored the Catholic Church. Nor had they alleged that the Code authorized the IRS to do what it was doing (allegedly closing its eyes to violations by the Church). Instead, "[t]he complaint center[ed] on an alleged decision made solely by the executive branch that, in plaintiffs' view, directly contravene[d] Congress' aim." *Id.* at 1028. The plaintiffs therefore had not established, as the Supreme Court requires, "a

sufficient nexus between the taxpayer's standing as a taxpayer and the *congressional* exercise of taxing and spending power." *Id.* (emphasis added). The present case is indistinguishable.[1]

Fortunately, this case not only meets the criteria for en banc review set forth in our rules, see Fed. R. App. P. 35, but also the criteria for certiorari review in the Supreme Court of the United States, *see* Sup. Ct. R. 10. This court has "decided an important federal question in a way that conflicts with the relevant decisions" of the Supreme Court. *See* Sup. Ct. R. 10(c). It also has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The Government therefore has one last forum in which to seek a return to traditional principles governing the right of a taxpayer to challenge a decision of the executive.

---

[1] The panel majority's terse attempt to distinguish *In re United States Catholic Conference* on the basis of there being, in that case, "no expenditure of appropriated funds," *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 993 (7th Cir. 2006), misses the mark. For purposes of taxpayer standing, a tax exemption is no different from a positive appropriation, and no less an exercise of Congress' power to tax and spend for the general welfare. *See* U.S. Const. art. I, sec. 8.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 04 C 0381 S

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNE NICOL GAYLOR; ANNIE LAURIE GAYLOR; AND DAN BARKER, PLAINTIFFS

v.

JIM TOWEY, DIRECTOR OF WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES; PATRICK PURTILL, DIRECTOR OF DEPARTMENT OF JUSTICE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; BRENT ORELL, DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; RYAN STREETER, DIRECTOR OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; JOHN PORTER, DIRECTOR OF DEPARTMENT OF EDUCATION CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; JULIETE MCCARTHY, DIRECTOR OF DEPARTMENT OF AGRICULTURE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; MICHAEL MAGAN, DIRECTOR OF AGENCY FOR INTERNATIONAL DEVELOPMENT CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; DAVID CAPRARA, DIRECTOR OF CORPORATION FOR NATIONAL AND COMMUNITY SERVICE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; ELAINE CHAO, SECRETARY OF THE DEPARTMENT OF LABOR; TOMMY THOMPSON, SECRETARY OF THE DEPARTMENT OF HEALTH AND

HUMAN SERVICES; ROD PAIGE, SECRETARY OF THE DEPARTMENT OF EDUCATION; JOHN ASHCROFT, SECRETARY OF THE DEPARTMENT OF JUSTICE; DR. JULIE GERBERDING, DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, DEFENDANTS

AMENDED COMPLAINT

---

1. This is an action by the plaintiffs brought against the defendants alleging violations of the Establishment Clause of the First Amendment to the United States Constitution.

2. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

3. Venue is appropriate in the District Court for the Western District of Wisconsin pursuant to 28 U.S.C. § 1391 (e).

4. The plaintiff, the Freedom From Religion Foundation, Inc., ("FFRF") is a Wisconsin non-stock corporation whose principle office is in Madison, Wisconsin.

5. FFRF has more than 5,000 members, including federal taxpayers, who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment of the United States Constitution.

6. FFRF's purpose is to protect the fundamental constitutionl principle of separation of church and state by representing and advocating on behalf of its members.

7. The plaintiff, Anne Nicol Gaylor, is a federal taxpayer residing in Madison, Wisconsin, and she is a

member and the President of FFRF, and she is a nonbeliever who is opposed to governmental establishment of religion.

8. The plaintiff, Annie Laurie Gaylor, is a federal taxpayer residing in Madison, Wisconsin, and she is a member and employee of FFRF and the Editor of FFRF's periodical "FreeThought Today," and she is a nonbelieiver who is opposed to governmental establishment of religion.

9. The plaintiff, Dan Barker, is a federal taxpayer residing in Madison, Wisconsin, and he is a member of and an employee and Public Relations Director of FFRF, and he is a nonbelieiver who is opposed to governmental establishment of religion.

10. The plaintiffs are opposed to the use of Congressional taxpayer appropriations to advance and promote religion.

11. The defendant, Jim Towey, is the Director of the White House Office of Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending authority of Article I, section 8, of the United States Constitution.

12. The activities of defendant Towey and his office are funded by Congressional budget appropriations, pursuant to Article I, section 8, of the Constitution, which Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution.

13. Congressional budget appropriations, including appropriations made for executive and administrative purposes, constitute legislation pursuant to Article I,

section 8, of the Constitution, which only Congress can make.

14. The President of the United States does not have authority to appropriate funds for the activities of defendant Towey and his office, without Congressional budget appropriations, and Towey's activities in his position and his office are subject to availability of Congressional budget appropriations, as recognized by Executive Order.

15. The defendant, Patrick Purtill, is the Director of the Department of Justice Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

16. The defendant, Bobby Polito, is the Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

17. The defendant, Ryan Streeter, is the Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provisions of the Constitution.

18. The defendant, John Porter, is the Director of the Department of Education Center for Faith-Based and Community Initiatives, a duly created office of the

Government of the United States, the activities of which are funded annually by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

19. The defendant, Juliete McCarthy, is the Director of the Department of Agriculture Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional tax appropriations, pursuant to the Taxing and Spending provision of the Constitution.

20. The defendant, Brent Orrell, is the Director of the Department of Labor Center for Faith-Based and Community Initiations [*sic*], the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

21. The defendant, Michael Magan, is the Director of the Agency for International Development Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

22. The defendant, David Caprara, is the Director of the Corporation for National and Community Service, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

23. The activities of the defendants, Purtill, Orell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, are funded by Congressional budget appropria-

tions made respectively to the Department of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, Agriculture, the Agency for International Development, and the Corporation for National and Community Service, pursuant to Article I, section 8, of the Constitution, and which Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution.

24. The Congressional budget appropriations for the activities of the defendants, Purtill, Orell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, derive from the authroity of Congress to appropriate tax money under the Taxing and Spending provision of the Constitution, and these defendants' activities are expressly made subject to the availability of adequate budget appropriations, as recognized by Executive Order.

25. The defendant, Elaine Chao, is the Secretary of the Department of Labor, a duly created office of the Government of the United States.

26. The defendant, Tommy Thompson, is the Secretary of the Department of Health and Human Services, a duly created office of the Government of the United States.

27. The defendant, Rod Paige, is the secretary of the Department of Education, a duly created office of the Government of the United States.

28. The defendant John Ashcroft, is the Attorney General of the United States and head of the U.S. Department of Justice, a duly created office of the Government of the United States.

29. The defendant, Dr. Julie Gerberding, is the Director of the Centers for Disease Control and Prevention, a duly created office of the Government of the United States.

30. The defendants have engaged in and are engaged in activities that violate the Establishment Clause of the First Amendment to the United States Constitution.

31. The defendants' actions have violated the fundamental principle of the separation of church and state by using Congressional taxpayer appropriations, made pursuant to the Taxing and Spending provision of the Constitution, to support activities that endorse religion and give faith-based organizations preferred positions as political insiders.

32. Defendants' actions, including by Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Magan, Caprara, Chao, Thompson and Ashcroft, include the support of national and regional conferences, which are funded with Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, and at which conferences faith-based organizations are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services.

33. Keynote speeches have been made at such national and regional conventions, for example, such as by defendant Paige at a White House Conference on Faith-Based Community Initiatives in October of 2002, at which he made the following statements that give the appearance of endorsing religion:

"With the stroke of a pen, the President signaled that this Administration will knock down any barrier, will do whatever it takes to get people of faith and goodwill involved in helping solve some of the problems in our society today.

Now, President Bush does this because he knows first-hand that power of faith to change lives—from the inside out. And the reason he knows this is because faith changed his life . . .

He grew up in church, but like most of us, he didn't always walk the walk. Many years ago, at a particularly low point in his life, he realized that something was missing. Fortunately for him, he bumped into the Reverend Billy Graham. And they had a long, long, long conversation. And he made a decision coming out of that conversation that changed his life. And he believes that if it can change his life, it can change the lives of others as well. And that is why he is so committed to this.

So the reason we're all here today is not because some politician needs to knock off one more thing on his 'to do' list. We are here because we have a President, who is true, is a true man of God. A man who prays every day. And I think together, we can really make a difference for mankind, for Americans, we can make America a better place. We can, and I enjoyed the prayer, as we began, served, getting food. He said, if the Jews could be better Jews, and if Christians could be better Christians, if all of us could just be a little better ourselves, what a difference that would make in this world, what a difference that would make.

So, he has made it his mission to level the playing field so good people who used to get left out of the process can now act on their spiritual imperative and can help others make a difference and can be partners with the federal government.

He's created this new initiative, because he knows you have tremendous powers to change lives. You have tremendous powers to make lives better. In many communities, you are the last line of defense. And when it comes to our nations' children, we need your help, big time . . .

The President has called upon my help to achieve this end. As United States Secretary of Education, he's asked me to lead this initiative. He said to me, I need your help. Well, guess what. I 'm here today to say to you, I need your help. I need your help. I need America's help, but most especially, the good people of faith. We need your help . . .

The federal government can provide funds, we can make laws, but we cannot provide love and faith and compassion. That's where you come in. You can do that. No one can do that better."

34. President George Bush also has spoken at such national and regional conferences, including the first White House National Conference on Faith-Based and Community Initiatives, held in June of 2004, at which the President touted the allegedly unique capacity of faith-based organizations to provide effective social services, including by singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations.

35. President Bush also made representative statements at a Regional Conference on Faith-Based and Community Initiatives in March of 2004 in Los Angeles, California, at which event the President extolled the virtues of funding for faith-based organizations, in language that invoked religious imagery, such as references to "miracles," as well as telling many anecdotal stories about alleged exemplary faith-based programs and outcomes, to the exclusion of any mention of non-faith based community programs.

36. The conferences and public events organized, set up and run by the defendants, including the defendants Towey and the Director of the Centers for Faith-Based and Community Initiatives, are funded with Congressional budget appropriations, pursuant to Article I, section 8 of the Constitution, and such events are intended to preferentially promote and advocate a climate conducive to funding for faith-based organizations, without similar advocacy for secular community-based organizations; the advocacy and promotion of funding for faith-based organizations, moreover, is based upon their status as faith-based organizations per se, rather than on the basis of their status as community-based organizations.

37. The defendants, including at such national and regional conferences, send messages to non-adherents of religious belief that they are outsiders, not full members of the political community, and the defendants send an accompanying message to adherents of religious belief that they are insiders and favored members of the political community.

38. A reasonable observer of the defendants' actions and listener to their words would perceive the defendants to be endorsing religious belief over non-belief at

such governmentally sponsored events, and which events give the appearance of stating the government's official support for and advocacy of funding of faith-based organizations precisely because such organizations are faith-based.

39. The defendants, including Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, organize, set up and conduct such public events to advance funding for faith-based organizations, using Congressionally enacted budget appropriations to conduct such advocacy, and which appropriations are made pursuant to Congress' Taxing and Spending authority.

40. The defendants' actions and/or words give support to and the appearance of endorsing a preference for the funding of faith-based organizations.

41. Defendants Towey and the Directors of the Centers for Faith-Based and Community Initiatives oversee the expenditure of Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, to advocate and promote federal funding for faith-based organizations precisely because such organizations are faith-based, and which actions include the promotion of capacity building of faith-based organizations; the defendants engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-based organizations; all of these funded activities give support to and the appearance of religious endorsement to reasonable observers and/or listeners, including because no comparable advocacy is made for secular community organizations.

42. The defendant Secretaries of the Departments of Labor, Health and Social Services, Education, and Justice, and the Director of the Centers for Disease Control and Prevention, further have directly and preferentially funded with Congressional taxpayer appropriations, pursuant to Article I, section 8, of the Constitution, services that integrate religion as a substantive and integral component, which also has the effect of establishing religion; such appropriations include funding for the Exodus Transnational Community, Inc., prisoner-reentry program, as part of the Ready (4) Work Initiative, co-funded by the Department of Justice and the Department of Labor, funding for Phoenix Match-Point Mentoring Program, funded by the department of Health and Human Services; Bridge to Hope Ministries, funded by a One-Stop Career Center grant from the Department of Labor; funding by the Department of Labor for its Ready (4) Work Initiative; funding for H.O.P.E. Center of Greater Community Temple Ministries Church of God in Christ, in Memphis, Tennessee, said grant made by the Department of Labor in 2003 at a regional conference; funding for Metro Atlanta Youth for Christ, in Decatur, Georgia, by the Department of Health and Human Services under its Mentoring Children of Prisoners Program; funding for Metro Atlanta Youth for Christ-Teen Moms Program, said funding provided by the Centers for Disease Control and Prevention in 2004 as part of a sexual abstinence program; funding for Faith Partners, in Colorado Springs, Colorado by the Department of Labor; and funding for Public/Private Ventures' contract to oversee a faith-based mentoring program involving Job Corps; each of these funding appropriations represents the spending of Congressional tax appropriations, made pursuant to Article I, section 8, of the Constitution, to fund pro-

grams administered by the respective agencies identified in this paragraph.

43. The defendant Secretaries and Director of the Centers for Disease Control also have funded intermediary faith-based organizations that preferentially award sub-grants to other faith-based organizations, including funding for the Interfaith Health Program of Rollins School of Public Health at Emory University, under a Department of Health and Human Services' Compassion Capital Grant, which grantee does not utilize objective criteria in making sub-awards; the Departments of Labor and Justice also have preferentially utilized faith-based organizations in the operation of their Ready (4) Work Program, in violation of any principle of neutrality.

44. The use of Congressional appropriations, made pursuant to Article I, section 8, of the Constitution, by the defendants gives actual preferences to and public appearances of government endorsement and advancement of religion.

45. The Congressional appropriations used to support the activities of the defendants convey a message that religion is favored, preferred, and promoted over other beliefs and non-belief.

46. The actions of the defendants in using Congressional taxpayer appropriations to endorse and advance religion violates the Establishment Clause of the First Amendment to the United States Constitution, including for example, the failure to assure that mentoring programs, such as Phoenix MatchPoint does not substantively incorporate religion, nor mentoring by Metro Atlanta Youth.

47. The actions of all the defendants in violating the Establishment Clause of the First Amendment to the United States Constitution are injurious to the interests of the plaintiffs individually, and to FFRF in its representative capacity, because the defendants' actions compel the plaintiffs to support the establishment, endorsement and advancement of religion, to which the plaintiffs object.

WHEREFORE, the plaintiffs demand judgement as follows: (a) For a judgement declaring that Congressional tax appropriations made by the defendants have been used in violation of the Establishment Clause of the First Amendment to the United States Constitution; (b) for an order enjoining the defendants from continuing to use appropriations in violation of the Establishment Clause of the First Amendment to the United States Constitution; (c) for an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations are not made and/or used to fund social service providers that include religion as an integral component of the funded activity; (d) for judgment awarding such further relief as the Court deems just and equitable; and (e) for judgement awarding the plaintiffs their reasonable costs, disbursements and attorney's fees, as allowed by law.

Dated this 9th day of September, 2004.

Richard. L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P.O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

APPENDIX F

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The First Amendment to United State Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FILED
OCT 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S

No. 06-157

In The

Supreme Court of the United States

DENNIS GRACE, ACTING DIRECTOR OF THE WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

BOARDMAN, SUHR, CURRY & FIELD LLP
ATTORNEY RICHARD L. BOLTON
Counsel of Record
1 South Pinckney Street, 4th Floor
Madison, Wisconsin 53703
(608) 257-9521

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May taxpayers raise an Establishment Clause challenge to executive branch uses of Congressional appropriations?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Freedom From Religion Foundation does not have a parent corporation and no publicly held corporation owns 10% or more of Freedom From Religion Foundation stock.

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE PETITION	3
I. EXECUTIVE OFFICIALS DO NOT HAVE THE RIGHT TO SPEND CONGRESSIONAL BUDGET APPROPRIATIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE	3
A. Taxpayers Have Standing To Challenge The Use Of Congressional Budget Appropriations To Promote Religion	3
B. Use Of General Budget Appropriations By Executive Officials To Promote Religion May Be Challenged By Taxpayers	5
C. The Seventh Circuit's Opinion Is Consistent With Prior Precedents	9
II. CONGRESSIONAL BUDGET BILLS CONSTITUTE APPROPRIATIONS AUTHORIZED BY LAW	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Booth v. Hvass, 302 F.3d 849 (8th Cir. 2002) 9

Bowen v. Kendrick, 487 U.S. 589 (1988) ..... *passim*

Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937) 12

Clinton v. New York, 524 U.S. 417, 118 S. Ct. 2091 (1998) 13

District of Columbia Common Cause v. District of Columbia, 858 F.2d 7 (D.C. Cir. 1988) 8

Everson v. Board of Education, 330 U.S. 1 (1947) 3

Flast v. Cohen, 392 U.S. 103 (1968) ..... *passim*

In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989) 10

Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991) 10

Mehdi and Chankan v. United States Postal Service, 988 F. Supp. 721 (S.D.N.Y. 1997) 10

Minnesota Federation of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989) 8

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) 12, 13

Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976) 9

Reeside v. Walker, 52 U.S. 272 (1850) 12

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 9

School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) 3

TABLE OF AUTHORITIES – Continued

Page

Schrum v. City of Coweta, 449 F.3d 1132 (10th Cir. 2006) 7

United States v. Richardson, 418 U.S. 166 (1974) 9

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 9

STATUTES

Article I, § 6 of the Constitution 9

Article I, § 7 of the Constitution 11, 12

Article I, § 8 of the Constitution ..... *passim*

OTHER

Corwin, The Constitution and What it Means Today, 134 (14th ed. 1978) 12

INTRODUCTION

The Seventh Circuit correctly held that Congressional tax appropriations to the executive branch of the Federal Government may not be used to endorse religion.

Petitioners complain that the Seventh Circuit's Opinion allows taxpayers to challenge the use of federal tax appropriations by the executive branch when such appropriations are allegedly used in violation of the Establishment Clause. Petitioners do not deny that the funds allegedly misused are derived from Congressional tax appropriations. Petitioners, however, would distinguish between general budget appropriations made by Congress and tax appropriations made to specific "spending programs."

The distinction urged by Petitioners is not based upon any principle of differential responsibility or culpability by Congress in making appropriations that are allegedly misused. The distinction urged by the Petitioners, instead, is based upon a belief that the executive branch should be able to use Congressional tax appropriations without accountability under the Establishment Clause.

The United States Supreme Court has already determined in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that taxpayer standing is not based upon Congressional culpability for making a decision to use tax appropriations in violation of the Establishment Clause. In *Bowen*, the Court recognized taxpayer standing even though a challenged expenditure was based upon a facially constitutional scheme, i.e., Congress appropriated money for purposes that in no way violated the Establishment Clause. Congress did nothing wrong. The Supreme Court, nonetheless, recognized taxpayer standing based upon the

alleged misuse of the tax appropriations in violation of the Establishment Clause.

The Seventh Circuit similarly concluded that taxpayers may challenge executive decisions relating to the use of appropriations made by Congress. The Court correctly recognized that to hold otherwise would countenance a distinction without a meaning – and insulate a substantial part of federal spending of taxpayer appropriations from any obligation to comply with the Establishment Clause. To hold otherwise, in fact, would support the unprecedented proposition that entire blocks of executive spending would not be subject to the Establishment Clause, i.e., as an executive function that is merely funded by taxpayer appropriations. Petitioners' argument would support the incongruous proposition that such spending, when pursued by the executive branch with Congressional appropriations, cannot be challenged by taxpayers objecting to the use of tax appropriations to endorse religion.

The Seventh Circuit correctly concluded that Petitioners' argument does not represent an accurate statement of the law, nor is it based upon a logical distinction relating to Congressional tax appropriations. In the end, all of the money comes from Congressional appropriations, which is important, and the misuse of such appropriations by the executive branch, even without any Congressional culpability, properly provides a basis for taxpayer standing.

Finally, Petitioners argue ominously, but incorrectly, that the Seventh Circuit has opened a floodgate. The Court, in fact, only allows taxpayer standing to challenge misuse of Congressional appropriations that are used to endorse religion. Such suits have been allowed since *Flast v. Cohen*, 382 U.S. 83 (1968), without any flood. Limiting

taxpayer standing to Establishment Clause transgressions has been an effective gatekeeper.

REASONS FOR DENYING THE PETITION

I. EXECUTIVE OFFICIALS DO NOT HAVE THE RIGHT TO SPEND CONGRESSIONAL BUDGET APPROPRIATIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. Taxpayers Have Standing To Challenge The Use Of Congressional Budget Appropriations To Promote Religion.

The Establishment Clause prohibits the use of Congressional tax appropriations to support religion. As the United States Supreme Court stated in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." At a minimum, "although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School District of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985). "Any use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). The principle against using public money for the promotion of religion, in short, lies at the heart of the prohibition of the Establishment Clause consistently recognized by the United States Supreme Court.

The Supreme Court has explicitly recognized that taxpayers have standing to challenge the use of Congressional tax appropriations in violation of the Establishment Clause. In *Flast*, 382 U.S. at 103, the Court specifically approved taxpayer standing to challenge the misuse of tax appropriations in violation of the Establishment Clause.

The Supreme Court recognized in *Flast* that the fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court: "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult Constitutional questions." *Id.* at 99.

The Supreme Court in *Flast* emphasized that the nexus for taxpayer standing relates to the litigant's status as taxpayer and the expenditure of tax revenue in violation of the Establishment Clause. The relationship between taxpayer and the misuse of tax money, the Court concluded, gives rise to standing because of the taxpayer's interest in assuring that taxes are not used in violation of the Establishment Clause. *Id.* at 105-06.

The Supreme Court's decision in *Flast* emphasized the Congressional source of the funds at issue, and the eventual expenditure of such taxes for a constitutionally proscribed activity. As Justice Stewart stated in concurrence, the Court's judgment and opinion "holds only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment." *Id.* at 113. Similarly, Judge Fortas stated in his concurrence that he understood

the Court's ruling "to be limited to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause." *Id.* at 115. Finally, Justice Harlan, in dissent, recognized the issue in *Flast* to "present the question whether federal taxpayers *qua* taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the Constitutionality of the uses for which Congress has authorized the expenditure of public funds." *Id.* at 117.

B. Use Of General Budget Appropriations By Executive Officials To Promote Religion May Be Challenged By Taxpayers.

Petitioners incorrectly interpret *Flast* to require Congressional responsibility or culpability for expenditures made by executive officials in violation of the Establishment Clause. This is not a correct reading of *Flast*, and its progeny. Petitioners ignore *Flast*'s premise that standing "is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." In practice, the Supreme Court has applied this test to focus on the Congressional source of financial support for activities used to promote religion. This requires in the federal context that funds be derived from tax revenue appropriated by Congress pursuant to Article I, § 8, of the Constitution, but it does not require that Congress direct the inappropriate use of such funds.

The Supreme Court has expressly held that the use of federal tax appropriations by executive branch officials, in violation of the Establishment Clause, gives rise to

taxpayer standing, even when the Congressional appropriation is facially Constitutional. A taxpayer has such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the Court depends for illumination of difficult Constitutional questions. *Bowen*, 487 U.S. at 618-20. A taxpayer, therefore, is a proper party to request an adjudication of the constitutionality of executive expenditure of appropriations made pursuant to Congress' Taxing and Spending authority under Article I, § 8.

Bowen makes clear that standing does not depend upon the culpability of Congress in making an appropriation that is used or expended by executive officials in violation of the Establishment Clause. Congressional culpability is not a predicate for taxpayer standing.

The facial constitutionality of the Congressional appropriation in *Bowen* was upheld by the Supreme Court. "We have concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state." 487 U.S. at 617. On that basis, the Court concluded that the Congressional spending statute did not itself violate the Establishment Clause. *Id.*

Despite the blamelessness of Congress in *Bowen*, the Supreme Court further considered whether the expenditure of tax appropriations was unconstitutional "as applied." The defendants in *Bowen* argued that a challenge to expenditures "as applied" was really a challenge to executive action, not to an exercise of Congressional authority under the Taxing and Spending Clause. *Id.* The Court rejected this argument. *Id.* at 619.

The *Bowen* and *Flast* decisions together make clear the conceptual and legal basis for taxpayer standing, which the Seventh Circuit correctly construed. First, a taxpayer must make a claim that tax dollars are being misused. This requirement provides a logical nexus between the taxpayer and his complaint, i.e., taxes are being misused. The corollary is also true. A taxpayer lacks standing based upon his or her status as a taxpayer without complaint about the use of tax appropriations. The challenged use of funds, therefore, must involve the use of funds appropriated by Congress pursuant to Article I, § 8, of the Constitution.

The originating source of misused funds from tax appropriations is the critical taxpayer standing factor, rather than any decisional culpability by Congress for the actual misuse. The *Bowen* decision makes clear that a Congressional appropriation that is constitutional on its face may still be challenged by a taxpayer if the funds are misused through the discretion of administrative and executive officers. The relationship between taxes and taxpayer is the critical factor, rather than whether Congress passed an appropriation bill that was facially unconstitutional. Congress can be blameless, as in *Flast* and *Bowen*, without defeating the standing of a taxpayer to challenge the misuse of a Congressional appropriation by executive officers.

Petitioners' argument implicitly, but incorrectly, assumes that the Establishment Clause operates only as a limitation on Congress. This Court, as well as other Circuits, have consistently recognized that the executive branch is subject to the prohibitions of the Establishment Clause. In *Schrum v. City of Coweta*, 449 F.3d 1132, 1140-1143 (10th Cir. 2006), the Eleventh Circuit rejected an

argument that the First Amendment proscriptions do not apply to executive action. The Court recognized that the Supreme Court has assumed on countless occasions that the Free Exercise Clause applies to executive action. *Id.* at 1140. Similarly, in the present case, the fact that executive branch actions are challenged is not a bar to an Establishment Clause claim; taxpayer standing requires only that the executive action involve the misuse of tax money raised through a Congressional appropriation.

Taxpayer standing is limited, however, by the types of misuse to which a taxpayer can object, i.e., expenditures in violation of the Establishment Clause. That is what has limited the scope of taxpayer standing. "*Flast* has limited federal taxpayer challenges by means of the second nexus." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 7, 14 (D.C. Cir. 1988). Petitioners, therefore, incorrectly claim that recognition of standing would open the courthouse doors to all generalized grievances that citizens may have with policies pursued by the government. Only misuses of appropriations in violation of the Establishment Clause confer taxpayer standing.

The Seventh Circuit correctly rejected the argument that general budget appropriations may be used by executive officials to endorse religion. In *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989), for example, the Eighth Circuit specifically rejected any notion that taxpayers only have standing where a special tax assessment was levied to pay for an expenditure that promoted religion. According to the Court, under such a rule, "when expenditures are made from general funds, no one would be able to challenge Establishment Clause violations. We believe taxpayer standing was created to specifically permit the airing of establishment

claims." (The Court of Appeals construed state taxpayer standing requirements to be interchangeable with the federal taxpayer standing requirements, announced in *Flast. Id.* at 1357.) *See also Booth v. Hvass*, 302 F.3d 849, 852 (8th Cir. 2002) ("*Randall* stands for the proposition that state taxpayers, just like federal taxpayers, must only show that there has been a disbursement in potential violation of constitutional guarantees when bringing Establishment Clause challenges.").

C. The Seventh Circuit's Opinion Is Consistent With Prior Precedents.

The Seventh Circuit's Opinion is consistent with prior decisions of the Supreme Court, and other courts as well. Cases cited by Petitioners either do not involve claimed expenditures under Article I, § 8, of the Constitution or they precede the Supreme Court's decision in *Bowen*. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), for example, the challenged action did not involve a Congressional appropriation pursuant to Article I, § 8, but rather involved an agency decision to transfer a parcel of federal property pursuant to an unrelated Constitutional provision. Similarly, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), involved an action against the federal government based on the Incompatibility Clause, Article I, § 6, of the Constitution. *United States v. Richardson*, 418 U.S. 166 (1974), also did not involve a challenge to the use of Congressional appropriations, but instead related to regulatory statutes affecting the CIA. Finally, *Public Citizen, Inc. v. Simon*, 539 F.2d 211 (D.C. Cir. 1976), also preceded *Bowen* and did not involve a specific Constitutional limitation on the Taxing and

Spending authority of Congress, i.e., the case did not involve any claim involving the Establishment Clause.

In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), comes closest to supporting Petitioners' position, but that decision no longer reflects the position of even the Second Circuit Court of Appeals. The *Catholic Conference* decision did not involve the alleged misuse of Congressional appropriations by the executive branch, and the Second Circuit in any event has circumscribed the *Catholic Conference* decision. In *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991), the Court limited the applicability of *Catholic Conference* to cases in which executive action is alleged to be *ultra vires*. *Id.* at 831. Here, Respondents do not claim Petitioners acted *ultra vires* – and the Seventh Circuit Opinion is not in conflict with the Second Circuit.

The *Lamont* decision subsequently has been applied by district courts in the Second Circuit as reflecting the prevailing view of taxpayer standing in that Circuit. *Mehdi and Chankan v. United States Postal Service*, 988 F. Supp. 721 (S.D.N.Y. 1997), is particularly instructive because it involved a claim that the United States Postal Service violated the Establishment Clause by maintaining sectarian holiday displays with federal tax appropriations. The court concluded that the plaintiffs had standing as taxpayers to challenge the government expenditures, made pursuant to Congress' Taxing and Spending power, as violative of the Establishment Clause. *Id.* at 727. Under Petitioners' argument to this Court, however, such expenditures would not be actionable by taxpayers because they are not part of a Congressional "spending program."

Here, the Seventh Circuit's decision to recognize standing is clearly supported by the law and the logic of the above decisions, including *Bowen*, which recognize taxpayer standing to challenge the use of Congressional budget appropriations by executive officials in ways that allegedly violate the Establishment Clause.

II. CONGRESSIONAL BUDGET BILLS CONSTITUTE APPROPRIATIONS AUTHORIZED BY LAW.

Petitioners urge that a distinction be recognized between appropriations for "Congressional programs" and "general budget appropriations" made to fund executive operations. The distinction proposed by Petitioners, however, is not a distinction that is recognized conceptually or legally. Petitioners cite no decision that recognizes such a distinction between Congressional appropriation bills, nor is the distinction provided with any conceptual plausibility.

Congressional appropriations for "programs" and/or budget appropriations, in all instances, constitute appropriations made pursuant to Congress' Taxing and Spending authority under Article I, § 8, of the Constitution, and pursuant to the Appropriations Clause of Article I, § 7. No distinction exists between administrative spending bills and executive budget appropriations, all of which must be passed by Congress as properly enacted laws pursuant to Article I, § 8. Congressional budget appropriations constitute authorizations to spend, just as in *Bowen*.

The Constitution does not distinguish between Congressional appropriations made to administrative "spending programs" and Congressional budget appropriations made to the executive branch. All appropriations require

Congressional legislative action. The Congressional "power of the purse" refers to this exclusive power of Congress to appropriate funds, which power derives from specific provisions of the Constitution, including Article I, § 8, which empowers Congress to "pay the Debts and provide for the common Defense and general Welfare of the United States." The Appropriations Clause, Article I, § 7, Cl. 9, further provides that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The provisions of the Constitution governing appropriations have been described as "the most important single curb in the Constitution on presidential power." *Corwin, The Constitution and What it Means Today*, 134 (14th ed. 1978). "No money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). Regardless of the nature of the payment – salaries, payments promised under a contract, etc., no payment may be made from the United States Treasury unless Congress has made the funds available. As the Supreme Court stated more than a century ago: "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not previously sanctioned by a Congressional appropriation." *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

The Constitutional requirements for appropriations remain as valid today as when adopted as part of the Constitution. *Citing* both *Cincinnati Soap* and *Reeside*, the Supreme Court has consistently held that any exercise of power by a government agency "is limited by a valid reservation of Congressional control over funds in the Treasury." *Office of Personnel Management v. Richmond*,

496 U.S. 414, 425 (1990). "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.* at 424. As a consequence, budget appropriation bills are enacted by Congress just as all other legislation. The Supreme Court described this process in *Clinton v. New York*, 524 U.S. 417, 448 (1998).

The exigencies of the Congressional appropriation process do not support Petitioners' attempt to distinguish between Congressional appropriations made to fund administrative "programs" and budget appropriation bills adopted to fund executive operations. The purported distinction advanced by the defendants is not based on any procedural difference, nor based upon any principled difference in the degree of discretion provided to the executive branch in determining the ultimate use of Congressional appropriations. As in *Bowen* and *Flast*, even administrative programs enacted and funded by Congress provide significant discretion to the executive branch to make decisions about the actual use of tax appropriations. That discretion, nonetheless, is clearly subject to judicial review in actions brought by taxpayers, and it is not any different than the discretion exercised by the executive branch in using budget appropriations made by Congress to fund executive operations.

CONCLUSION

The Seventh Circuit did not reach an unprecedented conclusion that taxpayers have standing to challenge executive branch misuses of Congressional budget appropriations in violation of the Establishment Clause. The

Seventh Circuit decided correctly and consistently with Supreme Court precedent, and the decisions of other Circuits. Petitioners, accordingly, have not established any compelling reason for this Court to grant the Petition.

Respectfully submitted,

ATTORNEY RICHARD L. BOLTON
Counsel of Record
BOARDMAN, SUHR,
CURRY & FIELD LLP
1 South Pinckney Street,
4th Floor
Madison, WI 53703
(608) 257-9521

Counsel for Respondents

FILED
NOV 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Page

Cases:

American Jewish Congress v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978) 8

Bowen v. *Kendrick*, 487 U.S. 589 (1988) 2, 6

DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) 2, 3, 7

Doremus v. *Board of Ed.*, 342 U.S. 429 (1952) 3

Flast v. *Cohen*, 392 U.S. 83 (1968) 1, 3, 4, 7

Friedmann v. *Sheldon Cmty. Sch. Dist.*, 995 F.2d 802 (8th Cir. 1993) 10

Lamont v. *Woods*, 948 F.2d 825 (2d Cir. 1991) 9, 10

Laskowski v. *Spellings*, 443 F.3d 930, (7th Cir.), amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006) 5

Minnesota Fed'n of Teachers v. *Randall*, 891 F.2d 1354 (8th Cir. 1989) 10

Public Citizen, Inc. v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976) 9

United States Catholic Conference, In re, 885 F.2d 1020 (2d. Cir. 1989), cert. denied, 495 U.S. 918 (1990) 9

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 2, 4, 5

Constitution and rule: Page

U.S. Const.:
Art. III 1, 5, 7, 8
Amend. I 9
Establishment Clause ..... *passim*
Sup. Ct. R. 35(3) 1

In the Supreme Court of the United States

No. 06-157

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS[1]

The court of appeals' decision in this case has created a new and broad Establishment Clause exception to Article III's case-or-controversy requirement. The court expanded *Flast* v. *Cohen*, 392 U.S. 83 (1968), to authorize taxpayer standing to challenge on Establishment Clause grounds anything an Executive Branch official does that is "funded by money derived from appropriations," Pet. App. 11a—which, of course, covers everything the Executive Branch does. Respondents devote the bulk of their brief in opposition to arguing that tax-

[1] Pursuant to Supreme Court Rule 35(3), Jay F. Hein has been substituted for his predecessor, Dennis Grace, who had been the Acting Director of the White House Office of Faith-Based and Community Initiatives.

payer standing should be every bit as broad as the court of appeals authorized. The only question at this juncture, however, is whether this Court should review the court of appeals' unprecedented expansion of taxpayer standing because it conflicts with this Court's decisions and their "promise" of "narrow application" of the doctrine, *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1865 (2006), as well as with the decisions of other courts of appeals. As a majority of the Seventh Circuit's judges agreed, Pet. App. 59a-66a, the confusion in the law and profound implications of the court of appeals' decision warrant this Court's review.

1. The court of appeals' decision departs significantly from this Court's taxpayer-standing decisions. While embracing (Br. in Opp. 4-9) the court of appeals' broad expansion of taxpayer standing, respondents nevertheless insist there is no conflict with this Court's precedent (*id.* at 9). But taxpayer standing to bring Establishment Clause claims cannot simultaneously be as broad as the court of appeals authorized and as narrow as this Court's cases command. See *DaimlerChrysler*, 126 S. Ct. at 1865 (noting "its narrow application in our precedent"); *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing."); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (discussing the "rigor with which the *Flast* exception * * * ought to be applied").

To put the conflict with this Court's precedent more starkly, this Court has carefully cabined the *Flast* exception for taxpayer standing in Establishment Clause cases by requiring that the taxpayer satisfy two criteria. First, "only" challenges to "exercises of congressional

power under the taxing and spending clause of Art. I, § 8, of the Constitution" are permitted. *Flast*, 392 U.S. at 102. Accordingly, all the cases in which this Court has recognized taxpayer standing to raise Establishment Clause challenges involve the disbursement of congressionally authorized funds to religiously affiliated entities. Pet. 16-20. Second, the challenge must be on Establishment Clause grounds, as opposed to some other alleged basis of unconstitutionality. *Flast*, 392 U.S. at 102; see *DaimlerChrysler*, 126 S. Ct. at 1864.

The court of appeals' decision has eliminated that first prong. The court of appeals recognized taxpayer standing to challenge an exercise of purely executive—not congressional—power. Respondents do not challenge the constitutionality of any law passed by Congress or the disbursement of funds earmarked by Congress for particular uses. Nor do they question Congress's power to pass appropriations legislation funding the salaries and activities of White House and agency personnel. Respondents, in fact, have been "unable to identify [any] appropriations" from Congress that they challenge. Pet. App. 10a. Instead, they challenge the decisions of Executive Branch officials to meet with faith-based and secular community organizations and to discuss the role such groups can play in community programs. Pet. App. 10a; see *id.* at 73a, 77a. Recognizing taxpayer standing to bring such a challenge not only fundamentally deviates from *Flast*, but also directly conflicts with this Court's decision in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), which *Flast* distinguished in discussing the first prong of its test. See *Flast*, 392 U.S. at 102; see also Pet. 17 & n.9. Respondents, by contrast, do not even attempt to distinguish this Court's decision in *Doremus*.

To be sure, the court of appeals considered it important (Pet. App. 11a) that those Executive Branch activities were "funded by money derived from appropriations." But that reduces the first prong of *Flast* to a pleading ritual. All Executive Branch activity is undertaken by officials whose salaries are "funded by money derived from appropriations," and who employ government resources (whether papers, pens, or electricity in their office space) that are "funded by money derived from appropriations." Indeed, the court of appeals acknowledged "the fact that almost all executive branch activity is funded by appropriations." *Id.* at 12a.

Respondents cogently capture (Br. in Opp. 7) the jurisprudential transformation wrought by the court of appeals' decision, explaining that taxpayers now need allege only "a claim that tax dollars are being misused" by Executive Branch officials. But those are not "exercises of *congressional* power under the taxing and spending clause of Art. I, § 8, of the Constitution," *Flast*, 392 U.S. at 102 (emphasis added), and this Court has made clear that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing," *Valley Forge*, 454 U.S. at 477.

In fact, if the court of appeals' decision were the law, as respondents suppose, this Court's decision in *Valley Forge*—which denied taxpayer standing for a challenge to the Executive Branch's transfer of federal property to a religious entity, 454 U.S. at 479—would have to be overruled. Respondents attempt (Br. in Opp. 9) to distinguish *Valley Forge* on the ground that it "involved an agency decision to transfer a parcel of federal property," rather than a challenge to congressional legislation. But respondents make no effort to explain how the use of appropriated funds (in terms of salaries and resources)

to deal with, process, and transfer property to a religious entity is different from the use of appropriated funds to meet and talk with religious entities, which is the sole predicate for taxpayer standing in this case. The difference that this Court saw between *Valley Forge* and *Flast* was of constitutional magnitude. *Valley Forge*, 454 U.S. at 474-481. The court of appeals has reduced it to a pleading error.

Recognizing the implications of its decision, the court of appeals excepted those cases where "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a. Whatever the value of such an "incremental cost" test—and there is little in constitutional history, law, or logic to commend it—that is not this Court's test. The court of appeals' decision to jettison the first prong of the *Flast* test in favor of a new jurisprudence of *non-de minimis* incremental cost is in such conflict with this Court's decisions and raises such important Article III and separation of powers concerns as to warrant this Court's review.[2]

---

[2] In the wake of its decision in this case, the Seventh Circuit has gone so far as to dispense not only with the first prong of the *Flast* test, but also with the requirement of a suit against a governmental entity that is bound by the Establishment Clause. See *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir.) (extending taxpayer standing to suits for recoupment against private grantees of federal funds), amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006). While that case underscores the need for this Court to provide guidance on the proper scope of taxpayer standing in Establishment Clause cases, the case at hand presents an antecedent breach of *Flast*'s limitations and reflects a general breakdown in standing jurisprudence that could recur any time that one of the more than 11 million taxpayers within the Seventh Circuit takes exception on Establishment Clause grounds to Executive Branch action occurring anywhere in the United

2. Respondents argue (Br. in Opp. 5-7) that *Bowen* eliminated the requirement that the taxpayer challenge a congressional exercise of the taxing and spending power and expanded taxpayer standing to any Establishment Clause "claim that tax dollars are being misused." Br. in Opp. 7. This Court said the opposite in *Bowen*, explaining that standing to challenge "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." 487 U.S. at 619-620. Under those circumstances, the claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health, Education and Welfare]." *Id.* at 619. What was key to standing, the Court concluded, was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620. In short, *Bowen* reaffirmed, rather than dispensed with, the requirement that taxpayers challenge *Congress's* exercise of its taxing and spending power.

States or perhaps even abroad. The question presented in *Laskowski* involves the distinct circumstance of remedying Establishment Clause violations when the underlying claim has been mooted and no action remains against the government. See Pet. at i, 9-10, *University of Notre Dame* v. *Laskowski*, No. 06-582 (filed Oct. 24, 2006). Accordingly, this Court should grant certiorari in this case without awaiting disposition of the *Laskowski* petition, which might not be positioned for review this Term.

The distinction between an agency's role as a conduit for congressionally directed disbursements and an agency's conduct of its routine internal operations is important, because the congressionally directed disbursement of funds outside the government to a religious entity or for religious ends is critical to reconciling taxpayer standing with Article III's case-or-controversy requirement. *Flast* found an Article III injury rooted in the historic constitutional concern—unique to the Establishment Clause—that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment," *Flast*, 392 U.S. at 103 (citation omitted). Given the unique constitutional and historical pedigree of that concern, the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could satisfy the individualized-injury requirement for Article III standing. *Id.* at 106; see *Daimler-Chrysler*, 126 S. Ct. at 1865 (under *Flast*, "the 'injury' [is] * * * the very 'extract[ion] and spen[ding] of 'tax money' in aid of religion") (quoting *Flast*, 392 U.S. at 106).

When the court of appeals in this case abandoned that nexus to the disbursement of funds—the extraction and spending of funds to aid religious groups—it eliminated the existence of a cognizable Article III injury in its taxpayer standing cases. While the Establishment Clause recognizes a distinct constitutional injury to taxpayers in having their "three pence" used to pay a minister's salary, *Flast*, 392 U.S. at 103 (citing Madison's "famous Memorial and Remonstrance Against Religious Assessments"), there is no such constitutional tradition of a cognizable individualized injury arising from the

payment of government officials' salaries when they make speeches or attend meetings, even with religious content. See Pet. 20 & n.10. To the contrary, from President Washington to President Lincoln to the present day, Presidents and other Executive Branch officials have made speeches invoking religion and have met with religious leaders without constitutional incident. See Pet. 20-21 & n.10.

The court of appeals thus transformed *Flast* from an exceptional determination that Article III is satisfied when taxpayers challenge Congress's use of its taxing and spending power to disburse funds to outside groups into a wholesale exception to Article III. That fundamental uprooting of this Court's taxpayer-standing jurisprudence "has serious implications for judicial governance," Pet. App. 63a (Ripple, Manion, Kanne & Sykes, JJ., dissenting from the denial of rehearing en banc), and "put[s] the judicial and the political branches of the federal government," as well as state governments," at odds." Pet. App. 60a (Easterbrook, J., concurring in the denial of rehearing en banc); see Ind. Amicus Br. at 8-10.

3. As noted by the four Seventh Circuit judges who dissented from the denial of rehearing en banc, the court of appeals' decision also creates an inter-circuit conflict that merits this Court's resolution. Pet. App. 24a-26a, 65a-66a. Respondents' argument confirms the conflict.

First, respondents have no answer to the argument that the court of appeals' ruling conflicts with the D.C. Circuit's decision in *American Jewish Congress* v. *Vance*, 575 F.2d 939 (1978), which denied taxpayer standing to challenge the actions not of Congress, but of "executive officials" who allegedly "expended governmental funds to effectuate cooperative programs" with

third parties in a manner that violated the First Amendment. *Id.* at 944.[3]

Respondents essentially concede the conflict with the Second Circuit, admitting that its decision in *In re United States Catholic Conference*, 885 F.2d 1020 (1989), cert. denied, 495 U.S. 918 (1990), "comes closest to supporting" the government's view. Br. in Opp. 10. Respondents argue, however, that *Catholic Conference* "no longer reflects the position" of the Second Circuit. *Ibid.* That is wrong. The court's taxpayer-standing analysis in that decision has never been overruled or even questioned in that circuit. Quite the opposite, the Second Circuit explained in *Lamont* v. *Woods*, 948 F.2d 825 (1991), that *Catholic Conference* continues to control when plaintiffs challenge purely executive action and "d[o] not impugn Congress's exercise of its taxing and spending power." *Id.* at 831.[4] Far from "limit[ing] the applicability" of *Catholic Conference* (Br. in Opp. 10),

---

[3] Respondents stress (Br. in Opp. 9-10) that *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976), did not involve an Establishment Clause challenge. But as to the first prong of *Flast*, the D.C. Circuit held in *Simon* that "mere executive activity that entails some expenditures" does not suffice for taxpayer standing. *Id.* at 218-219. That directly conflicts with the court of appeals' decision here. And, in any event, there is clearly a split between the Seventh Circuit's decision and the law of the D.C. Circuit, whether or not the latter is embodied in one decision or two.

[4] *Lamont* involved a challenge to a federal statute that authorized disbursements "to individuals or organizations in the United States for the benefit of specific foreign schools" on the ground that some of the schools were affiliated with sectarian sponsors. 948 F.2d at 828. As such, that suit against the federal agency that disbursed congressional funds fit the traditional *Flast* model of taxpayer standing because "Congress authorized the disbursements that are alleged to violate the Establishment Clause: [the agency] simply carried out Congress's scheme pursuant to its statutory mandate." *Id.* at 830.

Lamont thus reaffirmed that when the challenge is to Executive Branch activity, rather than to Congress's use of its taxing and spending power to disburse funds, taxpayer standing will be denied. 948 F.2d at 830-831; see *id.* at 831 (*Catholic Conference* governs when "[t]here [i]s no claim * * * that Congress had authorized the challenged agency action"). That is the opposite of the Seventh Circuit's decision here.[5]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2006

---

[5] Respondents' reliance (Br. in Opp. 8-9) on *Minnesota Federation of Teachers* v. *Randall*, 891 F.2d 1354 (8th Cir. 1989), is equally inapposite. That case also involved the statutorily authorized disbursement of funds to, *inter alia*, religious schools. *Id.* at 1355. The Eighth Circuit has since reaffirmed that a demonstrated nexus to legislative taxing and spending is critical. *Friedmann* v. *Sheldon Cmty. Sch. Dist.*, 995 F.2d 802, 803-804 (8th Cir. 1993). In any event, even if that court's dicta in *Randall*, 891 F.2d at 1358, that taxpayer standing exists "when expenditures are made from general funds" were to be applied in a manner as divorced from the *Flast* criteria as the Seventh Circuit did here, that would simply deepen the inter-circuit conflict that already warrants this Court's review.

AUG 31 2006

No. 06-157

IN THE

Supreme Court of the United States

DENNIS GRACE, Acting Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, KANSAS, MICHIGAN, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

*Counsel of Record

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
JULIE A. HOFFMAN
Deputy Attorney General

Counsel for Respondents

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

Troy King
Attorney General
State of Alabama

John Suthers
Attorney General
State of Colorado

Phill Kline
Attorney General
State of Kansas

Michael A. Cox
Attorney General
State of Michigan

Jim Petro
Attorney General
State of Ohio

W.A. Drew Edmondson
Attorney General
State of Oklahoma

Henry McMaster
Attorney General
State of South Carolina

Greg Abbott
Attorney General
State of Texas

Robert F. McDonnell
Attorney General
Commonwealth of Virginia

Rob McKenna
Attorney General
State of Washington

Patrick J. Crank
Attorney General
State of Wyoming

QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 2

I. Clarifying the Limits of Federal-Taxpayer-Standing Doctrine Will Likely Aid Lower Courts with Establishment Clause Cases Against State Officials as Well 2

II. Taxpayers Frequently Challenge a Wide Variety of State Programs on Establishment Clause Grounds 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

ACLU-Ky. v. Wilkinson, 701 F. Supp. 1296 (E.D. Ky. 1988) 9

Americans United for Separation of Church & State v. Sch. Dist. of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich. 1982) 9

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 6

Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983) 9

Cammack v. Waihee, 673 F. Supp. 1524 (D. Haw. 1987) 9

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) 10

DaimlerChrysler Corp. v. Cuno, __ U.S. __, 126 S. Ct. 1854 (2006) ..... *passim*

DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397 (2d Cir. 2001) 5

Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429 (1952) 4, 5, 6

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947) 5

Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*

Freedom from Religion Found., Inc. v. Bugher, 249 F.3d 606 (7th Cir. 2001) 8

Freedom from Religion Found., Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) 8, 9

Frothingham v. Mellon, 262 U.S. 447 (1923) 2, 4

Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005) 8

Cases (cont'd)

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 5

Minn. Fed'n of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989) 5

Minn. Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990) 9

Porta v. Klagholz, 19 F. Supp. 2d 290 (D.N.J. 1998) 8

Scarpino v. Grosshiem, 852 F. Supp. 798 (S.D. Iowa 1994) 9

Sch. Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled on other grounds, Agostini v. Felton*, 521 U.S. 203 (1997) 4

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 3, 4

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *rev'd on other grounds*, 536 U.S. 639 (2002) 8

Stark v. St. Cloud State Univ., 604 F. Supp. 1555 (D. Minn. 1985) 9, 10

Taub v. Kentucky, 842 F.2d 912 (6th Cir. 1988) 5, 6, 7

United States v. Richardson, 418 U.S. 166 (1974) 3

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 3

Van Zandt v. Thompson, 649 F. Supp. 583 (N.D. Ill. 1986), *rev'd on other grounds*, 839 F.2d 1215 9

Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986) 9

Cases (cont'd)

Winkler v. Chicago Sch. Reform Bd. of Trustees, 2000 WL 44126, at *8 (N.D. Ill. 2000).....8

Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003).....5

Other Authorities

Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771 (2003).....8

Constitutional Provisions

U.S. Const. art. I, § 8, cl.1 (Commerce Clause).....5, 7

U.S. Const. art. III ..... *passim*

U.S. Const. amend. I (Establishment Clause) ..... *passim*

INTEREST OF *AMICI CURIAE*

State officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions on Establishment Clause grounds. And, as the Court confirmed just last term, state-taxpayer standing is coterminous with federal-taxpayer standing. *See DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006). Taxpayers generally do not have standing to challenge government programs in federal court because any injury to the taxpayer from misappropriation of funds from the treasury is too remote and too attenuated to meet the "direct injury" requirement of Article III. The history underlying adoption of the Establishment Clause, however, has led to an exception from this general rule when taxpayers bring Establishment Clause challenges to legislative spending. The decision below expanding the circumstances in which this exception applies affects the states as well as the federal government.

Maintaining proper limits on this exception is necessary in light of the Constitution's horizontal and vertical structural limits on the exercise of government power. Vigilance concerning Article III standing is required to avoid using "a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *See Flast v. Cohen*, 392 U.S. 83, 106 (1968). It is also necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler*, 126 S. Ct. at 1864. Accordingly, the *amici* states, like the Federal Government, have a strong interest in ensuring that federal courts are limited to their proper judicial role, as justified by the text, history, and structure of Article III and the First Amendment, in adjudicating Establishment Clause cases.

REASONS FOR GRANTING THE PETITION

I. Clarifying the Limits of Federal-Taxpayer-Standing Doctrine Will Aid Lower Courts with Establishment Clause Cases Against State Officials as Well

State-taxpayer-standing doctrine, like its federal-taxpayer counterpart, is a staple of Establishment Clause cases. And while some lower court decisions have treated state and federal taxpayers differently, the Court confirmed last term in *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854 (2006), that they should be treated the same with respect to federal-court standing. The need is all the greater, therefore, for the Court to clarify the historical rationale for, and the contours of, taxpayer-standing doctrine in Establishment Clause cases.

1. The Court initially rejected the notion that individuals could have standing to sue either federal or state officials in federal court simply because they are taxpayers. In *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), the Court observed that the relation between a federal taxpayer and the federal treasury is too remote and too speculative to confer Article III standing. The Court rejected federal-taxpayer standing because allowing it would open the floodgates for taxpayers to challenge "every . . . appropriation act and statute whose administration requires the outlay of public money." *Id.* Relying on separation-of-powers doctrine, the Court observed that it has "no power per se to review the annul acts of Congress on the ground that they are unconstitutional" and that it may only consider such questions when there is "direct injury" that creates a justiciable issue. *Id.* at 488.

The Court first permitted federal-taxpayer standing in *Flast v. Cohen*, 392 U.S. 83, 103 (1968). In *Flast*, the Court held that a federal taxpayer has standing to challenge an act of Congress only when the taxpayer can demonstrate that

"the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.* at 102-03.

The only relevant "specific constitutional limitation" on the spending power for these purposes, of course, is the Establishment Clause. This is so because historically "one of the specific evils feared by" the Founders "was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. The Founders' concern was that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04. Thus, the Court held that a federal taxpayer had standing to assert that a congressional act exceeded Congress's powers to tax and spend because the act violated the Establishment Clause. *Id.* at 105-06. This narrow exception to the general rule denying taxpayer standing was intended solely to address the historical concerns of the Framers.

For this reason, the Court has rejected federal-taxpayer standing in cases raising other theoretical limits on the spending power. *See United States v. Richardson*, 418 U.S. 166, 174-75 (1974) (holding that taxpayer did not have standing to challenge statutes regulating the CIA's accounting process because taxpayer did not allege any specific constitutional limitation on Congress's taxing and spending power). And, more critical for this case, the historical rationale for taxpayer standing also implies limits on the type of government action—congressional spending—that taxpayers may target. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 (1982) (holding that because the Framers were concerned about use of the spending power, taxpayer standing did not extend to challenging an executive decision to transfer a parcel of federal property); *see also Schlesinger v. Reservists Comm.*

to Stop the War, 418 U.S. 208, 227-28 (1974) (holding that taxpayers did not have standing to challenge executive-branch action allowing members of Congress to maintain reserve status in the military).

2. Meanwhile, with respect to state-taxpayer standing, *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429 (1952), set the same course as *Frothingham*. "[W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" *Id.* at 434 (quoting *Frothingham*, 262 U.S. at 488). The Court stressed that a taxpayer case could satisfy Article III "only when it is a good-faith pocketbook action." *Id.*

No Establishment Clause case from this Court since *Doremus* has fully addressed state-taxpayer standing,[1] but *Flast* expressly declared its taxpayer/spending nexus test to be "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* . . . ." *Flast*, 392 U.S. at 102-03. *Flast* thus fully embraced the understanding that state taxpayers have the same limited ability as federal taxpayers to raise Establishment Clause challenges.

---

[1] *But see Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985) (collecting cases and summarily affirming state-taxpayer standing notwithstanding *Flast* based on "the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools"), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203 (1997).

Consistent with this understanding, some lower courts expressly apply *Flast* to state-taxpayer-standing claims. The Eighth Circuit has commented that, because *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), "indicated that the establishment clause limits state spending powers as well . . . the effect of *Flast* was to harmonize in some respects federal and state taxpayer standing" after *Doremus*. *Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (citing *Everson*, 330 U.S. at 16); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943 (11th Cir. 2003); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001); *Korioth v. Briscoe*, 523 F.2d 1271, 1276-77 & n.16 (5th Cir. 1975) (all applying *Flast* to state- or local-taxpayer-standing claims). Some circuits have even inferred that the requirement in *Doremus* of a "good-faith pocketbook action," 342 U.S. at 434, simply parallels the general Article III direct-injury requirement. *See Taub v. Kentucky*, 842 F.2d 912, 917 (6th Cir. 1988); *Korioth*, 523 F.2d at 1277 n.16. These cases confirm that state-taxpayer suits are governed by the same standard as federal-taxpayer suits.

3. Last term's decision in *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854 (2006), resolved any lingering doctrinal differences between state- and federal-taxpayer standing. There, the Court barred state taxpayers from suing to enjoin tax-credit incentives—which were designed to lure foreign businesses to the state—as violative of the Commerce Clause. *See id.* at 1859. The Court rejected the theory that taxpayers are directly injured because tax credits deplete the general fisc and impose greater burdens on them. *See id.* at 1862-63.

In reaching this decision, the Court relied on cases that have "denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers." *Id.* at 1862. Indeed, the "rationale for rejecting federal taxpayer standing applies with

undiminished force to state taxpayers," and state taxpayers have no argument "different from similar claims by federal taxpayers we have already rejected under Article III as insufficient to establish standing." *Id.* at 1863; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (plurality opinion) (stating that the Court has "likened state taxpayers to federal taxpayers" for purposes of standing and denied Article III standing where taxpayers cannot establish the requisite direct injury).

Critically, *DaimlerChrysler* also relied on *Doremus* as authority for the proposition that state taxpayers have no better Article III footing than federal taxpayers. *See DaimlerChrysler*, 126 S.Ct. at 1863. In fact, the Court reaffirmed that *Flast*—not *Doremus*—has created for Establishment Clause cases a limited exception to the Article III direct-injury rule. *See id.* at 1864-65.

The Court has thus made it clear that federal and state taxpayers must satisfy substantially the same standing requirements when suing in federal court. Full exposition of the limits of *Flast*, therefore, is important not only for federal-taxpayer lawsuits, but also for state-taxpayer lawsuits. The *amici* states' related interest in limiting the scope of permissible taxpayer standing to bring such lawsuits further justifies granting review.

4. Because state-taxpayer standing in Establishment Clause cases is subject to the same limits as federal-taxpayer standing, the decision below broadening taxpayer standing implicates not only federal government separation-of-powers concerns, *see* Pet. 27-28, but also vertical federalism concerns. As the Sixth Circuit has observed, "when State taxpayers attack state spending in federal court, another major consideration operates: the integrity of our government's federalist structure." *Taub*, 842 F.2d at 919.

The Court acknowledged essentially this point in *DaimlerChrysler* when it mentioned the affront to state sovereignty that occurs when federal courts stray beyond their ken to sit in judgment of state officials without a genuine Article III basis for review. Lax standards for state-taxpayer lawsuits "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler*, 126 S.Ct. at 1864.

This concern arises every bit as much in Establishment Clause cases as it does in Commerce Clause or other types of constitutional challenges. By definition, the government function at stake in all taxpayer-standing cases is government spending, and "[a] sovereign must have the authority to determine how tax revenues are to be spent, or the power to tax is illusory." *Taub*, 842 F.2d at 919. This same core sovereign act is at issue in taxpayers' Establishment Clause challenges. That is, whether the basis for a taxpayer's federal-court challenge to state spending arises from the First Amendment or elsewhere, the federalism value of judicial restraint—requiring forbearance absent well-established grounds for exercising jurisdiction—remains the same.

For these reasons, a decision in this case may benefit the states in terms of maintaining proper federal-state comity. If the Court grants review, reverses, and thereby narrows the circumstances when federal-court standing is available, it will have the concomitant effect of alleviating some vertical federalism concerns by reducing the number of taxpayer cases that could be brought against states in federal court.

II. Taxpayers Frequently Challenge a Wide Variety of State Programs on Establishment Clause Grounds

As things stand, state-taxpayer Establishment Clause challenges arise relatively frequently. According to a recent law-review article, federal district and appellate courts decided at least 50 such claims between 1982 and 2003. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 819 (2003). Additionally, since 1920, state taxpayers have been plaintiffs in at least 17 Establishment Clause cases that have received plenary review by this Court. *See id.* at 815-16.

State taxpayers bring Establishment Clause challenges against everything from school-voucher and charter-school programs to Boy Scout sponsorships, Good Friday holidays, prison-rehabilitation programs, prayer rooms, legislative prayer, monuments, nativity scenes, student-teacher programs, dual enrollment of public school students in religious schools, and other similar state-government programs.[2]

---

[2] *See, e.g.*, *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001) (permitting taxpayer challenge to grants to religious schools); *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1114 (S.D. Ind. 2005) (permitting state taxpayers to challenge legislative prayer); *Winkler v. Chicago Sch. Reform Bd. of Trustees*, 2000 WL 44126, at *8 (N.D. Ill. 2000) (allowing Illinois taxpayers to challenge state agency expenditures to sponsor Boy Scouts); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (allowing Ohio taxpayers to challenge state's payment of tuition to private schools through voucher program), *rev'd on other grounds*, 536 U.S. 639 (2002); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 295-96 (D.N.J. 1998) (addressing state-taxpayer challenge to statute funding charter schools operating out of church-owned buildings); *Freedom from*

This trend supports the need for review here. Like the decision below, some federal courts have permitted state-taxpayer-standing challenges not only to legislative-spending programs, but also to executive action funded by general legislative appropriations. *See, e.g.*, *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 (D. Minn. 1985) ("Funds for operation of the University program are provided in part

---

Religion Found., Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) (allowing state taxpayers to challenge Good Friday state holiday); *Scarpino v. Grosshiem*, 852 F. Supp. 798, 801 (S.D. Iowa 1994) (permitting ICLU to represent taxpaying members in challenge to prison-rehabilitation program); *Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990) (allowing state-taxpayer challenge to statute allowing public-school students to take coursework at religious post-secondary institutions); *ACLU-Ky. v. Wilkinson*, 701 F. Supp. 1296, 1302-03 (E.D. Ky. 1988) (holding state taxpayers had standing to challenge nativity scene at state capitol); *Cammack v. Waihee*, 673 F. Supp. 1524, 1527 (D. Haw. 1987) (allowing state taxpayers to challenge Good Friday state holiday); *Van Zandt v. Thompson*, 649 F. Supp. 583, 587 (N.D. Ill. 1986), *rev'd on other grounds*, 839 F.2d 1215 (holding taxpayer had standing to challenge prayer room in the capitol building); *Wilder v. Bernstein*, 645 F. Supp. 1292, 1309-11 (S.D.N.Y. 1986) (holding that state taxpayers have standing under *Flast*); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 n.2 (D. Minn. 1985) (finding state-taxpayer standing to challenge state university's student-teacher program); *Birdine v. Moreland*, 579 F. Supp. 412, 415 (N.D. Ga. 1983) (concluding state taxpayers had standing to challenge proposed monument); *Americans United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 546 F. Supp. 1071, 1075-76 (W.D. Mich. 1982) (allowing Michigan taxpayers to challenge school district's "shared time" program).

from the State of Minnesota's general operating fund."); *cf. Cammack v. Waihee*, 932 F.2d 765, 771 (9th Cir. 1991) (permitting taxpayer attack on Good Friday state holiday and stating that "[l]egislative enactments are not the only government activity which the taxpayer may have standing to challenge"). A decision in this case, therefore, is not only of theoretical importance to the *amici* states, but also is likely to resolve issues that actually arise in cases brought against state officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
JULIE A. HOFFMAN
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

Counsel for Respondents

Dated: August 31, 2006

FILED
JAN 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge, on Establishment Clause grounds, the actions of Executive Branch officials pursuant to an Executive Order, where the conduct at issue is financed only indirectly through general appropriations legislation and no funds are disbursed to any institutions or individuals outside the government.

PARTIES TO THE PROCEEDINGS

The petitioners, who were sued in their official capacity as defendants-appellees below, are Jay F. Hein, Director of the White House Office of Faith-Based and Community Initiatives; Steven McFarland, Director of the Department of Justice Task Force for Faith-Based and Community Initiatives; Jedd Medefind, Director of the Department of Labor Center for Faith-Based and Community Initiatives; C. Gregory Morris, Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives; Robert Bogart, Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives; Shayam K. Menon, Director of the Department of Education Center for Faith-Based and Community Initiatives; Therese Lyons, Director of the Department of Agriculture Center for Faith-Based and Community Initiatives; and Terri Hasdorff, Director of the Agency for International Development Center for Faith-Based and Community Initiatives.*

Rod Paige, the former Secretary of the United States Department of Education, was a defendant-appellee below, but is not a petitioner in this Court. Elaine L. Chao, Secretary of the United States Department of Labor, Tommy G. Thompson, the former Secretary of the United States Department of Health and Human Services, Alberto R. Gonzales, Attorney General of the United States, Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, and David Caprara, the former Director of Faith-Based and

---

* Pursuant to Supreme Court Rule 35(3), each of the petitioners has been substituted for their predecessors in office, who were the originally named defendants.

Community Initiatives at the Corporation for National and Community Service, were originally named as defendants, but were dismissed from the case in district court and were not parties to the appeal. Neither they nor their successors are parties before this Court.

The respondents, who were plaintiffs-appellants below, are Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, and the Freedom from Religion Foundation, Inc., a non-stock corporation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional provisions involved 2
Statement 2
Summary of argument 9
Argument:
Under Article III of the Constitution and separation of powers principles, taxpayer standing is narrowly limited to challenges to Congress's exercise of its taxing and spending power to disburse funds outside of the government 11
A. Article III's case-or-controversy requirement generally prohibits taxpayer standing to challenge how federal funds are expended 12
B. By its terms, *Flast* represents a narrow exception to the general rule against taxpayer standing 16
1. Taxpayer standing under *Flast* rests upon a unique and narrow historical concern about legislatively compelled subsidization of private religious exercise 16
2. This Court's precedents confirm the narrow ambit of taxpayer standing under *Flast* 20
C. Respondents' challenge to the speeches, meetings, and other operational activities of Executive Branch officials that do not entail the disbursement of federal funds outside the government do not support taxpayer standing 24

Table of Contents—Continued: Page

1. Respondents' objection to the constitutionality of the Executive Branch's activities is not a challenge to Congress's taxing and spending power 24
2. The mere presence of federal funding is insufficient to create taxpayer standing 26
3. Under *Flast*, taxpayer standing extends only to objections to Congress's disbursement of federal funds outside the government 38
4. Separation of powers principles require that the *Flast* exception for taxpayer standing remain narrowly cabined 45

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984) 13
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 15, 16
Bowen v. *Kendrick*, 487 U.S. 589 (1988) ..... *passim*
Bowen v. *Roy*, 476 U.S. 693 (1986) 43
Clinton v. *City of New York*, 524 U.S. 417 (1998) 31
Coleman v. *Miller*, 307 U.S. 433 (1939) 46
Commissioner v. *Banks*, 543 U.S. 426 (2005) 14
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) ..... *passim*
Doremus v. *Board of Educ.*, 342 U.S. 429 (1952) ..... *passim*

Cases–Continued: Page

Everson v. *Board of Educ.*, 330 U.S. 1 (1947) 18, 37, 41, 43, 45
Flast v. *Cohen*, 392 U.S. 83 (1968) ..... *passim*
Follett v. *Town of McCormick*, 321 U.S. 573 (1944) 14
Frothingham v. *Mellon*, 262 U.S. 447 (1923) 9, 12, 15, 16, 27
Giles v. *Harris*, 189 U.S. 475 (1903) 43
INS v. *Chadha*, 462 U.S. 919 (1983) 31
Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) 43
Laskowski v. *Spellings*, 443 F.3d 930 (7th Cir.), as amended on reh'g, 456 F.3d 702 (7th Cir. 2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006) 48
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 31
Locke v. *Davey*, 540 U.S. 712 (2004) 41
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13, 14, 15
Mitchell v. *Helms*, 530 U.S. 793 (2000) 18
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 14
Raines v. *Byrd*, 521 U.S. 811 (1997) 11, 46
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) ..... *passim*
School Dist. of Abington Township v. *Schempp*, 374 U.S. 203 (1963) 34, 39, 45
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 5, 14
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 13, 17

Cases–Continued: Page

United States v. *Armstrong*, 517 U.S. 456 (1996) 34
United States v. *Richardson*, 418 U.S. 166 (1974) ..... *passim*
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) ..... *passim*
Van Orden v. *Perry*, 545 U.S. 677 (2005) 39, 40
Warth v. *Seldin*, 422 U.S. 490 (1975) 14
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 14

Constitutions, statutes and regulations:

U.S. Const.:
Art. I 35
§ 6, Cl. 2 ..... 21, 35
Incompatibility Clause 21, 35
Ineligibility Clause 21, 35
§ 8 17
Cl. 1 (Taxing and Spending Clause) 33
§ 9, Cl. 7 ..... 25, 33
Art. II 9, 11, 36
Art. III ..... *passim*
§ 2 ..... 2, 13
Amend. I 2, 36, 42, 43
Establishment Clause ..... *passim*
Amend. IV 36
Amend. V 36
Amend. VI 36

Constitutions, statutes and regulations—Continued: Page

Amend. IX 36
Amend. X 36
Md. Const. of 1776, Decl. of Rights, para. XXXIII, *in* 3 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America* (1909) 42
N.H. Const. art. 6 42
N.C. Const. of 1776, art. XXXIV 41
Pa. Const. of 1776 41
Vt. Const. of 1776 41
Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*:
31 U.S.C. 1341 30
31 U.S.C. 1342 30
26 U.S.C. 501(c)(3) 5
Exec. Order No. 13,198, 3 C.F.R. at 750 (2002) 3
§ 2, 3 C.F.R. at 750 3
Exec. Order No. 13,199, 3 C.F.R. at 752-754 (2002) 2
§ 1, 3 C.F.R. at 752 ..... 2, 3
§ 2, 3 C.F.R. at 752 2
§ 3(j), 3 C.F.R. at 753 3
Exec. Order No. 13,279, 3 C.F.R. at 258 (2003):
§ 2(c), 3 C.F.R. at 260 4
§ 2(d), 3 C.F.R. at 260 4
§ 2(f), 3 C.F.R. at 260 3
Exec. Order No. 13,280, 3 C.F.R. at 262 (2003) 3
Exec. Order No. 13,342, 3 C.F.R. at 180 (2005) 3

Regulation—Continued: Page

Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006) 3

Miscellaneous:

Samuel Adams:

Oration on the Steps of the Continental State House (Phila., Pa. Aug. 1, 1776) 40

The Rights of the Colonists, in 5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) 40

An Old Whig, No. 5 (Fall 1787), *in* 5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) 33

Chester James Antieau, *The Higher Laws: Origins of Modern Constitutional Law* (1994) 40

Isaac Backus, *A History of New England 1774-1775, in* 5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) 41

Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After* Flast *v.* Cohen, 36 U. Chi. L. Rev. 364 (1969) 49

Sanford H. Cobb, *The Rise of Religious Liberty in America* (1902) 19

Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* (2000) 40

Edmund Fuller & David Eliot Green, *God in the White House: The Faiths of American Presidents* (1968) 40

Miscellaneous—Continued: Page

Alexander Hamilton, *The Farmer Refuted* (1775), *in The Republic of Reason: The Personal Philosophies of the Founding Fathers* (Norman Cousins ed., 1988) 40

Thomas Jefferson, *Act for Establishing Religious Freedom, in* 5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) 37

2 Samuel Johnson, *A Dictionary of the English Language* (1755) 37

11 *Journals of the Continental Congress* (Worthington Chauncey Ford ed., 1908) 39

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) 18, 37, 41

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suff. U. L. Rev. 881 (1983) 49

Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 Harv. L. Rev. 645 (1973) 49

5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987) ..... *passim*

The Republic of Reason: The Personal Philosophies of the Founding Fathers (Norman Cousins ed., 1988) 40

Miscellaneous—Continued: Page

3 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America* (1909) 42

Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First-Amendment Theory*, 36 Wm. & Mary L. Rev. 837 (1995) 42

Richard Vetterli & Gary C. Bryner, *In Search of the Republic* (rev. ed. 1996) 40

Webster's Third New Int'l Dictionary (1993) 37

John K. Wilson, *Religion Under the State Constitutions 1776-1880*, 32 J. Chruch & St. 753 (1990) 42

In the Supreme Court of the United States

No. 06-157

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc (Pet. App. 58a-66a), with the accompanying opinions concurring in and dissenting from the denial of rehearing en banc, is reported at 447 F.3d 988. The opinion of the district court denying in part the government's motion to dismiss the complaint (Pet. App. 27a-35a), and the final judgment of the district court (Pet. App. 36a-57a), are unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2006. A petition for rehearing was denied on May 3, 2006 (Pet. App. 59a). The petition for a writ of certiorari was filed on August 1, 2006, and the petition was granted on December 1, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, of the United States Constitution provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; * * * [and] to Controversies to which the United States shall be a Party.

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT

1. Pursuant to Executive Order 13,199, the President created the White House Office of Faith-Based and Community Initiatives (White House Office) within the Executive Office of the President. Exec. Order No. 13,199, 3 C.F.R. § 2, at 752 (2002). The President recognized that "[f]aith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods." *Id.* § 1, at 752. The President created the White House Office to ensure that "private and charitable community groups,

including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." *Ibid.* In particular, the President charged the White House Office "to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems." *Id.* § 3(j), at 753.

In addition to the White House Office, the President created Executive Department Centers for Faith-Based and Community Initiatives (agency Centers) in a number of federal agencies.[1] The purpose of those Centers is "to coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." Exec. Order No. 13,198, 3 C.F.R. § 2, at 750 (2002).

The President undertook that initiative to ensure that faith-based organizations "[w]ould be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character," as long as they "do[] not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13,279, 3 C.F.R. § 2(f), at 260 (2003). At the

---

[1] See, *e.g.*, Exec. Order No. 13,198, 3 C.F.R. at 750 (2002); Exec. Order No. 13,280, 3 C.F.R. at 262 (2003); Exec. Order No. 13,342, 3 C.F.R. at 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006).

same time, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration of Federal financial assistance under social service programs," *id.* § 2(c), at 260, and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discrimination against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.* § 2(d), at 260.

2. Respondents, the Freedom from Religion Foundation and three of its members, filed this action against the Director of the White House Office and the Directors of agency Centers at the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, and Agriculture, as well as the Director of the Center at the Agency for International Development. Pet. App. 67a-80a.[2] Respondents contended that petitioners violated the Establishment Clause by organizing national and regional conferences at which, according to the allegations of the complaint, faith-based organizations "are singled out as being particularly worthy of federal funding" and "the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." *Id.* at 73a para. 32. Respondents further alleged that petitioners "engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-

---

[2] Initially, respondents also sued David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, as well as the Director of the Center for Disease Control and Prevention, but they subsequently voluntarily dismissed the claims against those defendants. Pet. App. 37a.

based organizations," *id.* at 77a para. 41, and that "Congressional appropriations [are] used to support the activities of the defendants," *id.* at 79a para. 45.

Respondents' complaint sought a declaratory judgment that petitioners' activities violate the Establishment Clause, an injunction prohibiting further "use [of] appropriations in violation of the Establishment Clause," and "an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations" comport with the Establishment Clause. Pet. App. 80a. Respondents asserted standing based solely on their status as federal taxpayers. *Id.* at 68a-69a paras. 4-10.[3]

The district court dismissed the claims against petitioners for lack of standing. Pet. App. 27a-35a. The district court held that federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of "exercises of congressional power under the taxing and spending clause of Art. I, § 8," *id.* at 31a (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)), and that the challenged activities of the petitioners—organizing conferences and making speeches—"are not 'exercises of congressional power,'" *id.* at 34a. More specifically, the court found that the Director of the White House Office acts "at the President's request and on the President's behalf," and that none of the petitioners is "charged with the administration of a congressional program." *Id.* at 33a-34a. "The view that federal taxpayers as such should be permitted to bring Establishment Clause chal-

---

[3] The Freedom from Religion Foundation itself is a non-profit entity that is exempt from paying federal income taxes under 26 U.S.C. 501(c)(3), but it may assert standing on behalf of its taxpaying members. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

lenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations," the district court concluded, "has never been accepted by a majority of the Supreme Court." *Id.* at 33a.[4]

3. A divided court of appeals vacated the district court's order of dismissal and remanded. Pet. App. 1a-26a.

a. The majority held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, * * * even if the program was created entirely within the executive branch, as by Presidential executive order," as long as the actions of Executive Branch officials are "financed by a congressional appropriation." Pet. App. 16a. In the majority's view, taxpayer standing extends beyond legislative programs that allocate federal funding to third parties, and includes challenges to any Executive Branch activity funded "from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary

---

[4] The district court dismissed respondents' claim against former Secretary of Education Rod Paige, and the court of appeals affirmed that dismissal. Pet. App. 14a-15a, 35a. Respondents' amended complaint also asserted claims that the heads of certain federal agencies had violated the Establishment Clause by "directly and preferentially fund[ing]" particular programs that allegedly "integrate religion as a substantive and integral component" of their activities. *Id.* at 77a-79a paras. 42, 43. Respondents voluntarily dismissed all of those claims with the exception of two programs administered by the Secretary of Health and Human Services. The district court subsequently granted summary judgment for the Secretary with respect to one of those claims, and for respondents with respect to the other. *Id.* at 56a-57a. Neither of those decisions was appealed, and they are not at issue before this Court. *Id.* at 14a-15a.

power," as opposed to funding "from, say, voluntary donations by private citizens." *Id.* at 11a.

The court accordingly held that taxpayers have standing even if "there is no statutory program" enacted by Congress under its taxing and spending power, Pet. App. 11a, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a. In the majority's view, taxpayer standing requires only that the plaintiff's "objection [be] to a program for which money undoubtedly is 'appropriated,' albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly." *Id.* at 12a. Extending taxpayer standing in that manner was appropriate, the court reasoned, because "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." *Id.* at 13a.

b. Judge Ripple dissented. Pet. App. 16a-26a. In his view, allowing a taxpayer to challenge the conduct of Executive Branch officials "so long as that conduct was financed in some manner by a congressional appropriation" reflects a "dramatic expansion of current standing doctrine," *id.* at 16a, and "cuts the concept of taxpayer standing loose from its moorings," *id.* at 19a. Judge Ripple criticized the majority for abandoning the "narrow terms" on which this Court had recognized taxpayer standing, *id.* at 19a, which had required that a "plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power," *id.* at 22a. The majority's approach, Judge Ripple observed, now "makes virtually any executive action subject to taxpayer suit" because "[t]he executive can do nothing without general budget appropriations from Congress." *Id.* at 24a.

4. By a vote of 7-4, the court of appeals denied the government's petition for rehearing en banc. The four judges who dissented from the denial of rehearing en banc noted that the panel's decision to extend taxpayer standing to suits that "challenge[] *executive* action," Pet. App. 64a, "has serious implications for judicial governance," and "departs significantly from established Supreme Court precedent." *Id.* at 63a (Ripple, J., joined by Manion, Kanne, and Sykes, JJ.). In the dissent's view, "the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing." *Id.* at 65a. The majority's decision contravened that "very clear line," the dissent concluded, because "[s]ome expenditure of governmental funds is necessary for every executive action." *Ibid.*

Chief Judge Flaum concurred in the denial of rehearing en banc. Pet. App. 59a. He explained that his vote "is not premised upon a conclusion that the taxpayer standing issue * * * is free from doubt," but from his conviction that "the obvious tension which has evolved in this area of jurisprudence * * * can only be resolved by the Supreme Court." *Ibid.*

Judge Easterbrook also concurred in the denial of rehearing en banc. Pet. App. 59a-62a. While he acknowledged "considerable force in Judge Ripple's dissent," *id.* at 59a, Judge Easterbrook shared Chief Judge Flaum's view that only this Court can resolve the existing "tension" in the law governing taxpayer standing, *id.* at 62a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that taxpayer standing extends to challenges to Executive Branch activities that are the product of the President's exercise of his Article II power, not Congress's exercise of its taxing and spending power, and that do not themselves entail the disbursement of any federal funds outside the government. That decision—which equates the mere presence of appropriated federal funds with taxpayer standing—defies this Court's precedent, fundamentally alters the constitutional allocation of powers, and, if allowed to stand, would unravel this Court's taxpayer-standing doctrine.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), this Court held that Article III and the separation of powers generally prohibit taxpayer standing. In the forty years since the Court recognized a narrow exception to that prohibition in *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court's cases have consistently cabined taxpayer standing, permitting only Establishment Clause challenges to *Congress's* exercise of its legislative taxing and spending power through direct appropriations to fund the activities of churches and other sectarian institutions. Three times, taxpayers have asked this Court to expand their standing to include challenges to executive officials' conduct of the Executive Branch's business. Three times, this Court has refused. See *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).

This Court should reverse the court of appeals' decision for the same reason that it rebuffed those efforts.

Article III requires plaintiffs to have suffered an individualized and concrete injury-in-fact. A taxpayer's interest in the disposition of funds in the Treasury generally does not satisfy that test. In *Flast*, this Court carved out a narrow and rigidly defined exception under the Establishment Clause to that general prohibition on taxpayer standing. But the Court did so not because the Establishment Clause writ large demanded peculiar enforcement mechanisms. The Court did so because it discerned in the history of the Establishment Clause a distinct and individualized Article III injury to religious liberty when Congress uses its taxing and spending power to move money from the pockets of taxpayers into the pockets of sectarian entities for their religious use. Thus, even in the Establishment Clause context, the Court has made clear that taxpayers have standing only to challenge congressional action that inflicts "a direct dollars-and-cents injury," and not simply to assert "a religious difference" with governmental policies. *Doremus* v. *Board of Educ.*, 342 U.S. 429, 434 (1952)

Flast represents the high-water mark of this Court's modern taxpayer-standing jurisprudence, and this Court has repeatedly refused to extend *Flast* beyond its four corners. The court of appeals' decision, if allowed to stand, would fundamentally distend *Flast* by unmooring the doctrine from its historic roots and constitutional justification. Rather than reflect a particularized and historically sensitive application of Article III, the court of appeals would transform the doctrine of taxpayer standing into a roving license for any one of the more than 180 million taxpayers in the United States to challenge any action of the Executive Branch that offends that individual's own view of the Establishment Clause's proscription.

Fundamental separation of powers principles preclude that dramatic expansion of the judicial power to sit in judgment on the constitutionality of the actions of a coordinate Branch of government based on a single taxpayer's undifferentiated interest, shared in common with the public at large, in having the Executive Branch comport its Article II activities with the Establishment Clause. Such a retooling of *Flast* could not be squared with the precedents of this Court both before and after *Flast*. Further, by eliminating the boundaries set on *Flast*, the Court would call into question the validity, workability, and, thus, sustainability of any exception to the general constitutional prohibition on taxpayer standing. The Court, however, need not revisit *Flast* in this case if it hews to the original and carefully demarcated boundaries of the taxpayer-standing doctrine and overturns the court of appeals' impermissible enlargement of the narrow *Flast* exception.

ARGUMENT

UNDER ARTICLE III OF THE CONSTITUTION AND SEPARATION OF POWERS PRINCIPLES, TAXPAYER STANDING IS NARROWLY LIMITED TO CHALLENGES TO CONGRESS'S EXERCISE OF ITS TAXING AND SPENDING POWER TO DISBURSE FUNDS OUTSIDE OF THE GOVERNMENT

As this Court underscored just last Term, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1861 (2006) (brackets in original) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). Article III's standing requirement enforces that case-or-

controversy requirement, *ibid.*, and thus is key to maintaining the proper constitutional balance of powers. In adherence to the Constitution's standing requirement, this Court has held for more than 80 years, and it reiterated as recently as last Term in *DaimlerChrysler*, that an individual's status as a taxpayer alone generally provides an insufficient basis to confer Article III standing. *Ibid.*; see *Frothingham* v. *Mellon*, 262 U.S. 447 (1923).

In *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court concluded that the Establishment Clause's unique history supported carving out a narrow exception to the general rule against taxpayer standing for plaintiffs who challenge Congress's use of its taxing and spending power to subsidize with taxpayer funds the religious practices of private parties, in alleged violation of the Establishment Clause. *Id.* at 102-106. In the nearly four decades since *Flast*, this Court repeatedly has confirmed the narrow scope of that exception and has declined invitations to enlarge it. The court of appeals' decision in this case, however, significantly expands the *Flast* exception by opening Article III standing to any taxpayer's Establishment Clause objection to any governmental activity that entails the expenditure of budget funds—which is virtually everything the government does. That decision cannot be reconciled with this Court's precedent and is foreclosed by the constitutional limitations on standing embodied in Article III and separation of powers principles.

A. Article III's Case-Or-Controversy Requirement Generally Prohibits Taxpayer Standing To Challenge How Federal Funds Are Expended

The Constitution does not vest the federal judiciary with "an unconditioned authority to determine the con-

stitutionality of legislative or executive acts." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Rather, Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. That limitation is an indispensable "ingredient of [the] separation and equilibration of powers, restraining the courts from acting at certain times," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), and "confin[ing] federal courts to a role consistent with a system of separated powers," *Valley Forge*, 454 U.S. at 472. See *DaimlerChrysler*, 126 S. Ct. at 1861 ("[T]he case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotation marks and citation omitted).

An "essential and unchanging" component of the case-or-controversy requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That doctrine confines the judiciary's role to the resolution of disputes "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co.*, 523 U.S. at 102, and thereby "ensur[es] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society," *DaimlerChrysler*, 126 S. Ct. at 1860 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). See also *United States* v. *Richardson*, 418 U.S. 166, 192-194 (1974) (Powell, J., concurring). If a party lacks standing—and thus if the case "is not a proper case or controversy" —the federal "courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 126 S. Ct. at 1860-1861. The burden is on the

party asserting federal jurisdiction to establish standing. *Id.* at 1861 n.3; see *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975).

When standing rests on nothing more than the plaintiff's status as a taxpayer, that burden is usually insurmountable. That is because the "irreducible constitutional minimum of standing" requires that the plaintiff "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)).[5] Taxpayers, for example, have standing to challenge the individualized assessment of taxes against them because *collection* of the tax has a direct, immediate, and concrete impact on their personal finances. See, *e.g.*, *Commissioner* v. *Banks*, 543 U.S. 426 (2005) (dispute over definition of taxable income); *Follett* v. *Town of McCormick*, 321 U.S. 573, 575-577 (1944) (invalidating tax on the activity of preaching); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109-112 (1943) (invalidating tax on soliciting as applied to religious adherents).

By contrast, it is well established that taxpayers generally lack standing to challenge how tax dollars that were lawfully collected from them are *used* by the gov-

---

[5] To establish standing, a plaintiff also must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (brackets in original) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41-42, 43 (1976)).

ernment. This Court has repeatedly held that "the 'alleged deprivation of the fair and constitutional use of [a federal taxpayer's] tax dollar'" does not constitute an injury-in-fact that would support Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1862 (brackets in original) (quoting *Valley Forge*, 454 U.S. at 476). That is because a taxpayer's interest in the money that he has contributed to the federal Treasury

> is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Frothingham, 262 U.S. at 487. The alleged injury of misused tax dollars "is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" *DaimlerChrysler*, 126 S. Ct. at 1862 (quoting *Lujan*, 504 U.S. at 560, and *Frothingham*, 262 U.S. at 488); see *Valley Forge*, 454 U.S. at 477 ("[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer.").

The injury associated with misspent tax dollars, moreover, "is not 'actual or imminent,' but instead 'conjectural or hypothetical,'" *DaimlerChrysler*, 126 S. Ct. at 1862, since "it is pure speculation whether the lawsuit would result in any actual tax relief" for the plaintiff, *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 614 (1989) (opinion of Kennedy, J.). Indeed, because any additional taxation caused by the operation of a law would be visited

"upon a vast number of taxpayers," that consequence or "injury" "is essentially a matter of public and not of individual concern." *Frothingham*, 262 U.S. at 487; see *ASARCO*, 490 U.S. at 613. Article III standing requires that the plaintiff be "immediately in danger of sustaining some direct injury" as a result of the law's enforcement, and "not merely that he suffers in some indefinite way in common with people generally." *Frothingham*, 262 U.S. at 488. For courts to intervene in disputes based on such intangible and generalized—indeed, virtually universal—allegations of harm "would be not to decide a judicial controversy," as required by Article III's case-or-controversy requirement, but "to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly [courts] do not possess." *Id.* at 489.

B. By Its Terms, *Flast* Represents A Narrow Exception To The General Rule Against Taxpayer Standing

1. *Taxpayer standing under* Flast *rests upon a unique and narrow historical concern about legislatively compelled subsidization of private religious exercise*

In *Flast* v. *Cohen*, *supra*, this Court recognized a narrow exception to that general prohibition on taxpayer standing to challenge the government's expenditure of tax revenues. *Flast* held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. 392 U.S. at 102-104. The Court underscored, however, that taxpayer standing would extend "*only* [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102 (emphasis added). Challenges aimed not at congressional action

but at the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" by the Executive Branch, the Court emphasized, will not support taxpayer standing. *Ibid.*

Flast held not only that the taxpayer's challenge must target congressional taxing and spending, but also that there must be "a nexus between that [taxpayer] status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. In particular, the taxpayer must allege that Congress's exercise of its spending power under Article I, Section 8 of the Constitution "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," rather than simply asserting "that the enactment is generally beyond the powers delegated to Congress." *Flast*, 392 U.S. at 102-103. Surveying the history of the Establishment Clause and the Framers' particular concern "that the taxing and spending power would be used to favor one religion over another or to support religion in general," the Court reasoned that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power." *Id.* at 103-104. The Court has never held that any other constitutional constraint on Congress's taxing and spending power supports taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864.

Flast was not conceived as an exception to Article III's requirement of an individualized and concrete injury-in-fact. Courts have no authority to craft exceptions to the Constitution's limitations on judicial power. For a court to attempt to adjudicate cases that fall beyond the jurisdiction vested by Article III would "offend[] fundamental principles of separation of powers,"

Steel Co., 523 U.S. at 94, and would be the "very definition" of a court "act[ing] ultra vires," *id.* at 102.

Rather, in explaining the exception carved out by *Flast*, the Court discerned in the history of the Establishment Clause a unique and particularized injury directly tied to Congress's extraction and spending of taxpayers' dollars to subsidize churches, ministers, and similar forms of religious exercise by other individuals and entities outside the government. The *Flast* Court emphasized that "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S. at 103.

The Court cited, in particular, James Madison's *Memorial and Remonstrance Against Religious Assessments*, which Madison published in response to a proposed tax in Virginia "for the support of Christian teachers." *Everson* v. *Board of Educ.*, 330 U.S. 1, 72-74 (1947) (reproducing the proposed tax bill); see James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison argued and ultimately persuaded his fellow Virginians that no citizen should be "force[d] * * * to contribute three pence only of his property for the support of any one establishment," and that to permit such an incursion on religious liberty would allow government to "force [a citizen] to conform to any other establishment in all cases whatsoever." 5 *The Founders' Constitution* para. 3, at 82; see *Flast*, 392 U.S. at 103; see also *Mitchell* v. *Helms*, 530 U.S. 793, 856 (2000) (O'Connor, J., concurring) ("[T]he most important reason for according special treatment to direct money

grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition.").

The *Flast* Court thus sought to carve out a narrow exception to the general rule against taxpayer standing to permit taxpayer challenges to congressional appropriations that took the form of legislatively directed grants in aid of religion. See 392 U.S. at 114 (Stewart, J., concurring) (citing historical Establishment Clause concerns and stating that "[t]oday's decision no more than recognizes that the appellants have a clear status as taxpayers in assuring that they not be compelled to contribute 'three pence . . . of [their] property for the support of any one establishment'"). While the Establishment Clause was the product of many historical forces,[6] *Flast* determined that one—and only one—of those forces was uniquely and inextricably tied to an individual's status as a taxpayer—the individual's right not to have Congress take money out of his pocket and put it into the coffers of a church or other private sectarian entity for their religious use. *Flast* concluded that the injury caused by the extracting and spending of a taxpayer's money to subsidize or fund the religious exercise of others was sufficiently direct and particularized to satisfy Article III's standing requirements. See 392 U.S. at 94.

In so holding, the Court stressed that it would not suffice "to allege an insubstantial expenditure of tax funds in the administration of an essentially regulatory statute," and cited as an example the complaint in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), that publicly funded school teachers violated the Estab-

---

[6] See generally Sanford H. Cobb, *The Rise of Religious Liberty in America* (1902).

lishment Clause by reading the Bible in public school classrooms. *Flast*, 392 U.S. at 102. *Doremus* rejected the taxpayers' assertion of standing because "[i]t is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." 342 U.S. at 434. *Flast* likewise permits taxpayer standing only where the complaint states "a direct dollars-and-cents injury" based on Congress's exercise of its taxing and spending power in a manner that implicates the unique historical concerns that animated the *Flast* decision.

***2. This Court's precedents confirm the narrow ambit of taxpayer standing under* Flast**

The court of appeals' decision adopts an "unusually broad and novel view of [taxpayer] standing to litigate" the constitutionality of any Executive Branch action, *Valley Forge*, 454 U.S. at 470, as long as the officials' salaries or activities are funded by the federal Treasury. That holding has no foothold in this Court's precedent. Quite the opposite, in the four decades since *Flast* was decided, this Court has consistently reaffirmed that taxpayer standing is narrowly restricted to cases that fit *Flast*'s historic rationale, and that the doctrine "does not provide a special license" for taxpayers "to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

In *Flast* itself, the Court stressed that taxpayer standing would apply "*only* [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." 392 U.S. at 102 (emphasis added). Underscoring that taxpayer standing would be limited to challenges to congressional power, the Court stressed in the very next sentence that taxpayer stand-

ing would not extend to challenges to the Executive Branch's "incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Ibid.* Indeed, the Court explained at the beginning of the opinion that the jurisdiction of the three-judge Court —and thus of the Supreme Court itself, *id.* at 88 n.2— was premised on the plaintiffs' challenge to the constitutionality of federal law, rather than the Executive Branch's "administration" of the law, *id.* at 90. The Court then reiterated at the end of the *Flast* decision that the particular form of taxpayer standing it had recognized was designed to protect against "abuses of *legislative power*," and in particular the *spending* power. *Id.* at 106 (emphasis added).

Six years later, the Court underscored the narrow scope of taxpayer standing in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974). In that case, the Court rejected taxpayer standing because the plaintiffs "did not challenge an enactment under Art. I, § 3, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status," in alleged violation of the Ineligibility and Incompatibility Clauses of the Constitution, Art. I, § 6, Cl. 2. The Court held that taxpayer standing under *Flast* was limited to "challeng[ing] an enactment under Art. I, § 8," rather than contesting the alleged "invalidity of Executive action in paying" out taxpayer funds. *Schlesinger*, 418 U.S. at 228 & n.17.[7] See also *Richardson*, 418 U.S. at 175 (holding that a taxpayer

[7] Because the absence of any challenge to an exercise of Congress's taxing and spending power failed the first prong of the *Flast* test, the Court did not address whether the Incompatibility and Ineligibility Clauses impose specific constitutional constraints on Congress's taxing and spending power for purposes of the second *Flast* requirement.

lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA"); *id.* at 173 (*Flast* only "slightly lowered" the general bar to taxpayer standing and did so only for "suits against Acts of Congress.") (quoting *Flast*, 392 U.S. at 85).

Likewise, in *Valley Forge*, the Court emphasized that the *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property" to a religious college. *Id.* at 479. The Court explained that, while the agency's actions in transferring the property necessarily entailed the use of tax money from general appropriations, the Executive Branch's "expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed *only* [at] exercises of congressional power." *Id.* at 479 (emphasis added). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15 (quoting *Flast*, 392 U.S. at 102).

That pattern continued unbroken in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), where the Court repeated that *Flast* is a "narrow exception * * * to the general rule against taxpayer standing established in Frothingham." *Id.* at 618. The Court held that the *Flast* exception permitted the plaintiffs to challenge on its face a statute permitting the distribution of federal grant money to private entities, including religious organiza-

tions. See *ibid.* The Court also held that the taxpayers had standing to challenge the constitutionality of the statute as applied to particular grants made by the Secretary of Health and Human Services pursuant to the law, explaining that the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620. In so holding, however, the Court distinguished a challenge aimed not at the constitutionality of a federal spending statute, but at the Executive Branch's expenditure of funds in the course of administering or executing "an essentially regulatory statute." *Id.* at 619 (quoting *Flast*, 392 U.S. at 102).

Finally, just last Term, the Court reiterated that *Flast* has a "narrow application in our precedent," and must not be applied so broadly as to "transform federal courts into forums for taxpayers' generalized grievances." *DaimlerChrysler*, 126 S. Ct. at 1865. Rather, taxpayer standing is strictly limited to a claim that "*congressional action* under the taxing and spending clause is in derogation of the Establishment Clause," *id.* at 1864 (emphasis added) (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing has been recognized in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of protecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges

to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

C. Respondents' Challenge To The Speeches, Meetings, And Other Operational Activities Of Executive Branch Officials That Do Not Entail The Disbursement Of Federal Funds Outside The Government Do Not Support Taxpayer Standing

The court of appeals' holding that taxpayer standing extends to respondents' challenge to the allegedly unconstitutional conduct of Executive Branch officials solely because their salaries and supplies are paid for through appropriations departs dramatically from *Flast* and "cuts the concept of taxpayer standing loose from its [constitutional] moorings," Pet. App. 19a (Ripple, J., dissenting), because the claim does not entail a challenge to Congress's exercise of its taxing and spending power to subsidize the religious activities of persons or entities outside the government.

1. Respondents' objection to the constitutionality of the Executive Branch's activities is not a challenge to Congress's taxing and spending power

The court of appeals held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, * * * even if the program was created entirely within the executive branch, as by Presidential executive order," Pet. App. 16a, even if "there is no statutory program" enacted by Congress under its taxing and spending power, *id.* at 11a, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a. This Court's cases, however, have been quite explicit that an essential prerequisite to taxpayer standing un-

der *Flast* is a "challenge[] directed only [at] exercises of congressional power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (quoting *Flast*, 392 U.S. at 105); see *DaimlerChrysler*, 126 S. Ct. at 1864 (taxpayer standing under *Flast* applies when the taxpayer challenges "congressional action under the taxing and spending clause"); *Schlesinger*, 418 U.S. at 225 n.15 ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged."); *Flast*, 392 U.S. at 106 (challenge must be to "congressional action under the taxing and spending clause").

Respondents do not challenge any specific congressional action or appropriation, and respondents do not ask the Court to invalidate any Act of Congress, on its face or as applied. Respondents also do not question Congress's power to tax and spend to finance the salaries and day-to-day activities of Executive Branch officials, including paying them to give speeches or to conduct meetings. Nor do they challenge or seek to enforce any conditions imposed by Congress on federal spending. The funds at issue, in fact, were appropriated without attached conditions or programmatic directives for the President's discretionary use within the Executive Office of the President and federal agencies. And those funds would be spent on salaries, meetings, and other day-to-day activities whether or not those activities take a form to which respondents object. Respondents, in short, do not allege that *Congress* exceeded its taxing and spending authority in any respect and, thus, they do not allege the type of "direct dollars-and-cents injury," *Doremus*, 342 U.S. at 434, that could support taxpayer standing under *Flast*. See Pet. App. 64a (Ripple, J., dissenting from the denial of rehearing en banc) ("Here, as

in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress.").

Instead, the heart of respondents' complaint is that *Executive Branch* officials have made improper decisions about the particular subject matter of certain day-to-day operations, such as the allegedly religious content of their speeches and meetings.[8] Respondents thus challenge Executive Branch activities, not a congressional program and not any financial disbursements to outside entities. But what Executive Branch officials say and what meetings they conduct in doing the President's business are quintessentially Executive actions. They are no more congressional exercises of the taxing and spending power than a Presidential decision to host a summit of foreign leaders or the President's delivery of a State of the Union address.

2. *The mere presence of federal funding is insufficient to create taxpayer standing*

The court of appeals reasoned that taxpayer standing requires nothing more than Congress's passage of a funding law that makes it possible for Executive Branch officials to run afoul of the Establishment Clause. Pet. App. 8a (statute must "ha[ve] been necessary for the violation to occur—it did not have to be sufficient"); see *id.* at 11a-12a. That is incorrect, for four reasons.

---

[8] See Pet. App. 77a para. 40 (challenging the "actions and/or words" of Executive Branch officials); *id.* at 75a-76a paras. 34, 35 (challenging the content of presidential speeches); *id.* at 77a para. 41 (challenging Executive Branch officials' "myriad activities, such as making public appearances and giving speeches"); *id.* at 73a para. 32 (challenging Executive Branch officials' "support of national and regional conferences"); *id.* at 76a-77a paras. 36, 39 (challenging Executive Branch officials' organization and conduct of conferences).

First, this Court has never adopted such a sweeping "funding ergo standing" test for taxpayer standing. Indeed, that rationale is fundamentally at odds with the general rule that taxpayer status does not confer standing to challenge how federally financed "officials of the executive department of the government are executing" their duties. *Frothingham*, 262 U.S. at 488.

Moreover, even with *Flast*'s narrow exception to that rule, this Court has never suggested that the mere presence of federal funding is sufficient. To the contrary, the Court has repeatedly required plaintiffs to articulate a specific challenge to "congressional action under the taxing and spending clause," *DaimlerChrysler*, 126 S. Ct. at 1864; *Flast*, 392 U.S. at 106. Under *Flast*, it is only when the congressional spending decision itself causes the alleged injury that the unique historic concern about Congress's abuse of its taxing and spending power to compel religious subsidization is implicated.

Indeed, this Court's decisions in *Valley Forge* and *Doremus* foreclose the court of appeals' funding-equals-standing rule. In *Valley Forge*, as here, federal funds paid the salaries of federal officials while they processed applications for property. Compare 454 U.S. at 466-467, with Pet. App. 69a-73a. In addition, federal funds financed the determination by Executive Branch officials in *Valley Forge* that a religious group had a unique "program of utilization which provides * * * the greatest public benefit" for the use of surplus government property. 454 U.S. at 467 & n.4.

That is no different from respondents' allegation here that federal funds financed Executive Branch officials' determination that faith-based groups have a "unique capacity * * * to provide effective social services." Pet. App. 75a para. 34. The use of taxpayer

funds thus was as "necessary for the violation to occur" (Pet. App. 8a) in *Valley Forge* as in this case, and accordingly the *Valley Forge* complaint would have satisfied the court of appeals' test for standing. But it did not satisfy this Court's test. The Court held that those allegations were insufficient and that the plaintiffs in *Valley Forge* lacked standing because the object or "source of their complaint is not a congressional action, but a decision by [a federal agency]." 454 U.S. at 479. While federal funds were unquestionably employed and expended, that was not enough. "[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. And even though in *Valley Forge*, unlike here, the challenged Executive Branch activity resulted in the distribution of property to an outside religious entity, the Court still found standing lacking.

In fact, the Court expressly rejected the contention that the taxpayers' right "extends to the Government as a whole, *regardless of which branch is at work in a particular instance*, and regardless of whether the challenged action was an exercise of the spending power." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added; citation omitted). That argument, the Court explained, was "premised on a revisionist reading of our precedents" and lacked any "[l]ogical[]" limitation. *Ibid.* Given that evaluating and publicly certifying the comparative "public benefit" offered by a religious group and then transferring 77 acres of land to it, *Valley Forge*, 454 U.S. at 468, does not support standing, then it necessarily follows that discussing religious groups in speeches and inviting them to conferences does not confer Article III standing either.

Likewise, in *Doremus*, taxpayers alleged standing to challenge public schoolteachers' reading of passages from the Bible in the classroom each day. Although taxpayer funds paid those teachers' salaries while they read from the Bible, just as here taxpayer funds paid federal officials' salaries as they allegedly spoke about religious groups in speeches and at conferences, this Court held that the plaintiffs lacked standing. 342 U.S. at 434. The Court explained that the plaintiffs could not identify any particular statutory provision—a "separate tax" or a "particular appropriation," *id.* at 433—that funded the Bible reading. The fact that taxpayer funds made it possible for the teachers to be in the classroom reading the Bible to students was not enough. *Id.* at 434 (noting the absence of "a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of"). The problem for the taxpayers in *Doremus* was that their real complaint was not the expenditure for teachers' salaries, but the essentially "regulatory" decision to read the Bible. Likewise here, respondents' real complaint is not the dollar-and-cents injury from expenditures on Executive Branch salaries and supplies, but the essentially "regulatory" decision of Executive Branch officials (allegedly) to emphasize the benefits of religion and religiously affiliated organizations in their speeches and meetings. See also *Schlesinger*, 418 U.S. at 211, 228 (taxpayer standing denied where taxpayers "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch," even where that action involved the use of taxpayer funds to pay Members of Congress their Reserve salaries).

In short, when the statutory direction is for the Executive to do something other than disburse funds, nei-

ther that direction nor the Executive Branch's subsequent actions or expenditures in carrying it out gives rise to taxpayer standing. And that remains true even if the legislature's non-spending direction, see, *e.g.*, *Doremus*, or the executive action, see, *e.g.*, *Valley Forge*, arguably violates the Establishment Clause.

Second, the court of appeals' approach provides no principled basis for determining when the disposition of federal funds stops being an exercise of congressional power and becomes Executive action. In the court's view, any activity funded by a congressional appropriation—which means virtually everything the Executive and Judicial Branches do—is a sufficient exercise of the taxing and spending power to trigger the *Flast* exception.[9]

But Congress's taxing and spending power is not self-perpetuating after an appropriation is made. Basic separation of powers principles recognize limits to Congress's role and reach. Once an appropriations law, whether general or targeted, is passed by both Houses of Congress and signed into law by the President, implementation and execution of that law is Executive Branch action. More specifically, when Congress provides funds to the Executive Branch to be used in the Executive's discretion and outside of a congressional spending program, Congress's taxing and spending role ends when the funds are appropriated—that is, when the funds are delivered into the control of the Executive Branch. A taxpayer does not have a "continuing stake * * * in the disposition of the Treasury to which he has contributed

---

[9] While the court of appeals would apparently treat differently official activity that is funded by "voluntary donations by private citizens," Pet. App. 11a, that would appear to be a null set. See Anti-Deficiency Act, 31 U.S.C. 1341, 1342.

his taxes, and [a] right to have those funds put to lawful uses." *Valley Forge*, 454 U.S. at 484 n.20. The disbursement of funds for Congress's purpose—which in this case was to fund the operations of the Executive Branch itself, without further condition and outside of a congressional spending program—is the circuit breaker. The use of non-earmarked funds after this point becomes a matter of Executive discretion, not the exercise of Congress's taxing and spending power.[10] And while there may be any number of plaintiffs who have standing to challenge the more particularized Executive Branch implementation of a congressional appropriation, their standing must rest on something other (and more particularized) than taxpayer standing under *Flast*.

The court of appeals reasoned that *Kendrick* supported taxpayer standing here because it permitted a challenge to a congressional spending program as applied or administered by the Department of Health and Human Services. Pet. App. 8a. But this Court found standing in *Kendrick* because the agency disbursed funds at *Congress's* behest pursuant to a *congressional* taxing and spending program. The object of the plaintiffs' complaint was "a program of disbursement of funds pursuant to Congress' taxing and spending powers, and [their] claims call[ed] into question how the funds authorized by Congress are being disbursed pursuant to the

---

[10] See *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is an[] administrative decision traditionally regarded as committed to agency discretion."); see also *Clinton* v. *City of New York*, 524 U.S. 417, 446 (1998); *id.* at 466-469 (Scalia, J., concurring in part and dissenting in part); *id.* at 480 (Breyer, J., dissenting); *INS* v. *Chadha*, 462 U.S. 919, 952-959 & n.16 (1983) (defining constitutional limits on the scope of the legislative role).

[Act]'s statutory mandate," not the Executive's discretionary judgment. 487 U.S. at 619-620 (emphasis added). The explicit decision to permit funds to be disbursed to religious groups was Congress's, not the Executive's. See *id.* at 595-596 (quoting statute's numerous references to "religious * * * organizations"). This Court's decision simply recognized that the fact that the funding authorized by Congress "ha[d] flowed through and been administered by the Secretary [of Health and Human Services]" did not absolve Congress of responsibility for that judgment and adoption of that spending program. *Id.* at 619.

Here, there is no congressional taxing and spending program under challenge. Respondents have pointed to no law that directs that funds be used for any allegedly unconstitutional purpose, and respondents are not suing any Executive Branch official who disburses or distributes federal funds. To the contrary, the court of appeals' acknowledged that "[t]his is a program that the President," not Congress, "has created by a series of executive orders," not exercises of the legislative taxing and spending power. Pet. App. 8a.

Third, because the Executive Branch depends upon general appropriations to function, the court of appeals reasoned that the difference between congressionally directed spending programs and federally financed executive action "cannot be controlling." Pet. App. 11a. But the distinction between the Legislature's taxing and spending power and Executive action makes all the difference under this Court's cases for purposes of Article III's standing requirement. That is what *Valley Forge*, *Richardson*, *Schlesinger*, and *Doremus* held. Indeed, *Valley Forge* rejected in terms the argument that taxpayer standing applies "regardless of which branch is at

work in a particular instance." 454 U.S. at 484 n.20. Yet, under the Seventh Circuit's decision, the result in *Valley Forge* was a product of pleading error, not constitutional limitation. Had the plaintiffs simply asserted a taxpayer injury based on the use of "appropriations for the general administrative expenses" (Pet. App. 11a) involved in evaluating the public benefit of the religious group's proposed use of the property and transferring the property to the group, the plaintiffs would have had standing.

This Court repudiated that approach in *Valley Forge*, *Richardson*, *Schlesinger*, and *Doremus* for good reason. The Court in *Flast* explained that its exception to the general rule against taxpayer standing rested on distinct historical forces directly tied to concerns about *Congress*'s abuse of its "unlimited power of taxation," *An Old Whig, No. 5* (1787), *in* 5 *The Founders' Constitution* 86 (emphasis omitted), to fund the religious exercise of a church or other religious entity. Under *Flast*, the Article III injury that supports standing is the individual taxpayer's loss of religious liberty when the legislature extracts money from his pocket and puts it into a church's or someone else's coffers to fund religious exercise. See, *e.g.*, *DaimlerChrysler*, 126 S. Ct. 1865. Those are harms that the Executive Branch, which lacks the power to levy taxes and to spend "for the * * * general Welfare," see U.S. Const. Art. 1, § 8, Cl. 1, cannot inflict. See also *id.* Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.").

The court of appeals reasoned that taxpayer standing was nonetheless appropriate because "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." Pet. App.

13a. That rationale is seriously flawed. Courts have no license to expand their own authority beyond the limits set by Article III based on nothing more than unsubstantiated speculation that a coordinate branch of government will flout the Constitution's commands. Indeed, the presumption is that Executive officials will faithfully discharge their constitutional obligations, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and, in fact, there is no history of the kind of general abuse hypothesized by the court of appeals.

More to the point, what is relevant to the question of *taxpayer* standing is that there is *not* so much that Executive officials could do to promote religion (were they so inclined) that inflicts the specific type of *taxpayer injury* that was of unique concern to the Framers and that provided the foundation for the particular Article III injury recognized in *Flast*. Only Congress can "extract[] and spen[d]" "tax money" in aid of religion, *Flast*, 392 U.S. at 106, and "only" challenges to such "exercises of congressional power" will support taxpayer standing, *id.* at 102. See *DaimlerChrysler*, 126 S. Ct. at 1865.

In any event, the court of appeals' concern is unfounded. This Court's cases demonstrate that violations of the Establishment Clause by executive officials need not go unchecked. While *Doremus* denied taxpayer standing to challenge Bible reading in public school classrooms, later cases in which plaintiffs had standing in a more particularized capacity than as mere taxpayers provided the opportunity for plaintiffs to demonstrate that such conduct "promote[s] religion in ways forbidden by the establishment clause" (Pet. App. 13a). See *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (standing to challenge Bible reading in class as parents of school children).

Fourth, if the first criterion for taxpayer standing under *Flast* were to require nothing more than proof that governmental action was financed through taxpayer funds, it would be an empty test. As the court of appeals recognized, "almost all executive branch activity is funded by appropriations." Pet. App. 12a. Requiring nothing more than the presence of federal funding would, for all intents and purposes, reduce the test for taxpayer standing into a pleading question that turns solely on whether the plaintiffs raise an Establishment Clause challenge.

And even that line might not hold since the rationale for limiting taxpayer standing to Establishment Clause challenges has been that Clause's unique historical nexus to "the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 103; see *Richardson*, 418 U.S. at 173. The second prong of *Flast* requires taxpayer-plaintiffs to invoke a "specific constitutional limitation[] imposed" not upon the Executive Branch or the federal government generally, but upon "*congressional*" power. 392 U.S. at 103 (emphasis added). The taxpayer must allege that the "congressional action" under challenge "is in derogation of those constitutional provisions *which operate to restrict the exercise of the taxing and spending power.*" *Richardson*, 418 U.S. at 173. Identifying a constitutional constraint on the exercise of Executive power—whether the Ineligibility and Incompatibility Clauses of the Constitution, Art. I, § 6, cl. 2, or the Establishment Clause as it applies to the Executive Branch—does not suffice to support taxpayer standing under *Flast*. See *Valley Forge*, *supra*; *Schlesinger*, *supra*. But jettisoning the requirement that the plaintiffs challenge a congressional action in the first place might well lead to a parallel dilution of the

constitutional nexus requirement of the second prong of *Flast*, as it would be difficult to justify requiring the plaintiff's constitutional objection to specifically constrain congressional power if no exercise of congressional power needs to be challenged in the first place.

Furthermore, once the focus on congressional taxing and spending is breached, there is no historic rationale for limiting taxpayer standing to Establishment Clause challenges. While *Flast* explained that the Framers had a distinct taxpayer-based concern about *Congress*'s abuse of its legislative taxing and spending power to establish a religion, there is no evidence that the Framers were any more concerned that the government would adopt measures "respecting an establishment of religion," writ large, than measures "abridging the freedom of speech, or of the press," or measures respecting the separation of powers or principles of federalism, or would engage in "unreasonable searches and seizures," would compel defendants to be witnesses against themselves, or would deny criminal defendants a trial by jury. U.S. Const. Arts. I, II, III; *id.* Amends. I, IV, V, VI, IX, X.

Noting this Court's statement that the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" by the Executive Branch will not support taxpayer standing, *Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102, the court of appeals attempted to rewrite the first prong of *Flast* into a test of whether "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a. That approach misunderstands the Establishment Clause, misreads this Court's precedent, and is unworkable.

To begin with, the Establishment Clause is no place for a jurisprudence of incremental cost. The Framers' objection to legislative taxing and spending to subsidize private churches and the religious exercise of others was one of principle, not degree. The concern was not that such a tax could be too big, but that as small amount as even three pence was too much. *Memorial and Remonstrance Against Religious Assessments*, *in* 5 *The Founders' Constitution* 82; see also *DaimlerChrysler*, 126 S. Ct. at 1857; Thomas Jefferson, *Act for Establishing Religious Freedom*, *in* 5 *The Founders' Constitution* 84-85. "Their objection was not to small tithes. It was to any tithes whatsoever. * * * Not the amount but 'the principle of assessment was wrong.'" *Everson*, 330 U.S. at 41 (Rutledge, J., dissenting).[11]

Furthermore, the court of appeals misunderstands what an "incidental expenditure of tax funds in the administration of an essentially regulatory statute" means. *Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102. "Incidental" does not mean incremental. See *Webster's Third New Int'l Dictionary* 1142 (1993). It means an expenditure that is an adjunct or byproduct of a legislative program aimed at some end other than taxing and spending, such that the injury—whether large or small—is not a dollars-and-cents injury. Thus, this Court has repeatedly held that the Executive Branch's routine use of federal funds for such things as salaries and resources

---

[11] At the time of Madison's Remonstrance, such references to "pence" were understood to refer to a very small amount of money. See 2 Samuel Johnson, A Dictionary of the English Language (1755) (defining "pence" as the "plural of *penny*," and "penny"" as " [a] small coin, of which twelve make a shilling * * * a subordinate species of coin," and "[p]roverbially[] A small sum").

in the course of conducting the government's business—outside the context of a congressional taxing and spending program—do not support taxpayer standing. See *Valley Forge*, *supra*; *Schlesinger*, *supra*; *Richardson*, *supra*; *Doremus*, *supra*.

Finally, as Judge Easterbrook explained, the court's "incremental cost" test is inadministrable. "If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between $0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute)." Pet. App. 61a-62a. There is no sound basis for deciding, as the court of appeals did, that the cost to taxpayers of petitioners' references to religious groups in speeches and conferences is sufficient to support taxpayer standing, but that the cost of the President's or the Secretary of Education's delivery and reproduction of a speech discussing religion is not. See *id.* at 14a-15a; see also *id.* at 62a (Easterbrook, J., concurring in the denial of rehearing en banc) ("[T]he panel draws a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece). Where is the coherence in such a doctrine?"). Indeed, the whole doctrine of taxpayer standing is built on the premise that is it *not* enough to allege injury based simply on the theory that taxpayers have incurred "some cost" (*ibid.*) due to the government action at issue. See *DaimlerChrysler*, 126 S. Ct. at 1862.

3. Under* Flast, *taxpayer standing extends only to objections to Congress's disbursement of federal funds outside the government

The court of appeals erred in finding taxpayer standing not only because of the absence of a challenge to Congress's taxing and spending power, but also because the

Court in *Flast* limited its exception to a particular manifestation of the taxing and spending power—the disbursement of funds outside of the government to subsidize the religious activities of churches and other private entities. The distinct taxing concern that *Flast* found had influenced the adoption of the Establishment Clause was not simply that Congress would exercise its power to support religion, but that it would do so in a particular way—through the provision of funds to churches or other institutions outside the government to subsidize their own religious exercise.

The problem against which Madison remonstrated and Thomas Jefferson inveighed was not that Executive Branch officials, with their taxpayer-funded salaries, would speak favorably about religion or that they would meet with representatives of religious groups. Quite the opposite, religious themes appear frequently in the Nation's founding documents and the speeches and letters of the Framers.[12] The Continental Congress itself announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by the direct interposition of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 *Journals of the Continental Congress* 477 (Worthington Chauncy Ford ed., 1908). Likewise, President Washington—on the taxpayers' dime—issued the first Thanksgiving Day proclamation to "recommend to the people of the United States a day

---

[12] See, *e.g.*, *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2859 (2005) (plurality opinion) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.") (quoting *Schempp*, 374 U.S. at 213); *id.* at 2861-2862 (citing additional examples).

of public thanksgiving and prayer" for "the many and signal favors of Almighty God." *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2861 (2005) (plurality opinion) (citation omitted). The taxpayers also paid the salary of President Lincoln when he delivered the Gettysburg Address, with its "extensive acknowledgments of God." *Id.* at 2863 n.9.[13] There is no evidence that the Framers considered the *taxpayers'* religious liberty to be distinctly

---

[13] See also Alexander Hamilton, *The Farmer Refuted* (1775) ("[T]he Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest; and invested him with an inviolable right to personal liberty and personal safety."), *in The Republic of Reason: The Personal Philosophies of the Founding Fathers* 333 (Norman Cousins ed., 1988) (internal quotation marks omitted); Richard Vetterli & Gary C. Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government* 59 (rev. ed. 1996) ("The Founders, as a whole, were deeply religious men. * * * The foundation of their modern republican philosophy was based on a belief in God."); Chester James Antieau, *The Higher Laws: Origins of Modern Constitutional Law* 124 (1994); Samuel Adams, *The Rights of the Colonists* (1772), *in* 5 *The Founders' Constitution* 60 ("'Just and true liberty, equal and impartial liberty' in matters spiritual and temporal, is a thing that all Men are clearly entitled to, by the eternal and immutable laws Of God and nature."); Samuel Adams, *Oration on the Steps of the Continental State House* (Phila., Pa., Aug. 1, 1776) ("[T]he hand of heaven appears to have led us on to be, perhaps, humble instruments and means in the great providential dispensation which is completing.") (quoted in Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* 60 & n.15 (2000)). For the similar sentiments of many other Founders, see *id.* at 60-69 (quoting Oliver Wolcott, Samuel Chase, John Adams, Elbridge Gerry, John Witherspoon, and William Williams); *In Search of the Republic*, *supra*, at 66-68 (quoting James Madison, John Adams, Thomas Jefferson, John Jay, Alexander Hamilton, and Benjamin Franklin); see generally Edmund Fuller & David Eliot Green, *God in the White House: The Faiths of American Presidents* (1968).

infringed by funding such references or religious contacts.

Rather, the particular taxing concern that troubled the Framers was, as explained in *Flast* and other decisions of this Court, focused narrowly on the fear that Congress would use its power forcibly to transfer funds from taxpayers into the coffers of churches or other institutions—institutions that were external to the government and staffed by religious, not governmental, officials—which would then use the funds for inherently religious activities.[14] The tax against which Madison protested aimed to provide funds not for the government's internal operations, but to churches for the training of Christian ministers.[15] That was also a common

---

[14] See *Locke* v. *Davey*, 540 U.S. 712, 722 (2004) ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."); *id.* at 722-723 (discussing other historical examples); *Flast*, 392 U.S. at 103-104; *Everson*, 330 U.S. at 11 ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation. It was these feelings which found expression in the First Amendment."); see *id.* at 10-11 & nn.8-10.

[15] See *Memorial and Remonstrance Against Religious Assessments*, *in* 5 *The Founders' Constitution* 82-84; see also *id.* at 84-85 (reproducing Jefferson's Act for Establishing Religious Freedom); *id.* at 58-59 (letter from Benjamin Franklin protesting forced taxation for "maintaining the Presbyterian or independent worship"); *id.* at 65 (reproducing Isaac Backus, *A History of New England 1774-75*) (asserting "an entire freedom from being taxed by civil rulers to religious worship"); *id.* at 71 (quoting N.C. Const. of 1776, art. XXXIV) (no person shall "be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry"); *ibid.* (quoting similar provision from the Pennsylvania Constitution of 1776); *id.* at 85 (quoting similar provision from the Vermont Constitution of 1786).

aspect of established religion in the States around the time the Constitution and the First Amendment were adopted.[16]

Accordingly, the unique and historic injury to religious liberty upon which this Court focused in *Flast* was not that tax funds would be used within the government to reference or even to promote religion. Instead, the animating concern was that private funds would be ex-

---

[16] See, *e.g.*, Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First-Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 874 (1995) (discussing taxation to support the Dutch Reformed Church in New York); Md. Const. of 1776, Decl. of Rights, para. XXXIII, *in* 3 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America* 1689 (1909) (discussing Maryland tax "for the support of the Christian religion"); John K. Wilson, *Religion Under the State Constitutions 1776-1880*, 32 J. Church & St. 753, 755 (1990) (noting that, before the American Revolution, nine of the thirteen colonies provided direct tax aid to churches, but five of those nine states "disestablished immediately, and with little discussion" after the Revolution); *id.* at 756 (discussing a Georgia constitutional provision that provided for the imposition of a general assessment upon each person to support his own church); *id.* at 758 (discussing Massachusetts' constitutional provision directing that "[t]he legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their expense, for the institution of the public worship of God and for the support and maintenance [of] public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntary"); *id.* at 759 ("Some Baptist churches even sued their own members in court, and had property seized when 'dissenters' refused to pay."); *ibid.* (quoting Article 6 of the New Hampshire Constitution (amended 1968), which allowed towns to impose a tax to support Protestant teachers, as long as no person "shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination").

tracted from individual taxpayers and handed over to churches and other religious institutions external to the Branches of government in order to subsidize their religious exercise. That was "the right not to contribute three pence . . . for the support of any one [religious] establishment" that Madison sought to vindicate. *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 103); see *Flast*, 392 U.S. at 114 (Stewart, J., concurring) ("[E]very taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution.").

The history of the Establishment Clause, however, does not support recognition of a distinct injury-in-fact —uniquely traceable to a taxpayer's status as such—in not supporting the speeches and day-to-day activities of Executive Branch officials. Cf. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) (individuals have no First Amendment right "to dictate the content of the Government's internal procedures"). Under the Constitution, such "religious difference[s]," *Doremus*, 342 U.S. at 434, or policy disagreements are to be addressed not through the courts, but through "political safeguards" and "democratic accountability." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005); see *Giles* v. *Harris*, 189 U.S. 475, 488 (1903) ("[R]elief from a great political wrong * * * must be given by * * * the legislative and political department of the government of the United States."). They are not Article III "cases" or "controversies."

Confining taxpayer standing to challenges to the congressionally authorized disbursement of funds outside the government hews not only to that history, but also to this Court's precedent. In both *Flast* and *Kendrick*—the only two cases in which this Court has upheld tax-

payer standing—the taxpayers challenged congressional programs that, by their terms, authorized the disbursement of federal funds to outside entities, including religious organizations. In *Flast*, the Court observed that "[t]he gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in * * * religious schools." 392 U.S. at 85.

Likewise, in *Kendrick*, the Court stressed that the plaintiffs' constitutional objections were to the "disbursement of funds" and "how the funds authorized by Congress are being disbursed" to sectarian grantees. 487 U.S. at 619-620. Reinforcing that point, the Court noted that the challenged funds "flowed *through*" a federal agency en route to an alleged religious use. *Id.* at 619 (emphasis added). *Kendrick* did not hold that taxpayer standing exists whenever federal funds have flowed *to* a federal agency and stopped there.

To establish the requisite taxpayer injury to support standing under *Flast*, a plaintiff therefore must challenge congressional action directly authorizing the disbursement of funds to entities outside the government in alleged derogation of the Establishment Clause. Asserting nothing more than a link between the challenged government activity and funding stemming from appropriations legislation has no historic or precedential antecedent from which to discern that individualized injury-in-fact required by Article III. Cf. *Valley Forge*, 454 U.S. at 480 n.17 ("[A]ny connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent.").

To be sure, continuing to adhere to the historic and precedential limitations on taxpayer standing in this manner would leave areas of governmental activity that

are not susceptible to suit by taxpayers, as such. But this Court has never suggested that taxpayer standing should be a universal panacea for every taxpayers' Establishment Clause qualms. Quite the opposite, the Court has consistently underscored the narrow and historically measured scope of the *Flast* doctrine, see, *e.g.*, *DaimlerChrysler*, 126 S. Ct. at 1865, and has made clear that taxpayer standing does not exist to challenge "religious difference[s]," *Doremus*, 342 U.S. at 434, or every alleged Establishment Clause transgression, see *Valley Forge*. Moreover, the absence of standing as a taxpayer to challenge an Executive Branch action on Establishment Clause grounds does not mean that no one will be able to challenge the action. Compare *Doremus* (no taxpayer standing to challenge Bible reading in public school classrooms), with *Schempp*, 374 U.S. at 224 n.9 (parents of students have standing to challenge teacher-led Bible reading in public school classrooms).

In any event, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489 (citation omitted). That approach "would convert standing into a requirement that must be observed only when satisfied." *Ibid.*

4. Separation of powers principles require that the Flast exception for taxpayer standing remain narrowly cabined

Fundamental separation of powers concerns preclude enlarging the *Flast* exception beyond the particular exercise of Congress's taxing and spending power at issue in *Flast*—that is, the extraction and spending of taxpayer dollars to subsidize or fund the religious activities of others.

First, Article III requires an injury in fact. To the extent that requirement can be satisfied under *Flast* based solely on taxpayer status, the alleged injury must hew to the one historical paradigm that, at the time of the Establishment Clause's adoption, pertained directly to an individual's taxpayer status and that, under *Flast*, amounted to a distinct and personalized injury to individual religious liberty.

Second, because taxpayer standing cases involve, by definition, challenges to the constitutionality of the actions of a coordinate branch of government, see *Flast*, 392 U.S. at 103, the standing inquiry must be "especially rigorous," *Raines*, 521 U.S. at 819, and "observe[d] fastidiously," *Coleman* v. *Miller*, 307 U.S. 433, 464 (1939) (opinion of Frankfurter, J.). Declaring unconstitutional "an act of the Legislative or Executive Branch * * * is a formidable means of vindicating individual rights," and "when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing" the "ultimate and supreme function" of interpreting the Constitution. *Valley Forge*, 454 U.S. at 473. Indeed, "[r]elaxation of standing requirements is directly related to the expansion of judicial power," such that loosening the constraints on taxpayer standing "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, 418 U.S. at 188 (Powell, J., concurring). The requirement of concrete injury, in particular, "insur[es] that such adjudication does not take place unnecessarily." *Schlesinger*, 418 U.S. at 221.

Proper respect for the separation of powers thus requires that the Judicial Branch not "hospitably accept for adjudication claims of constitutional violation by

other branches of government where the claimant has not suffered cognizable injury." *Valley Forge*, 454 U.S. at 474. Because constitutional challenges to the acts of the Executive Branch "affect[] relationships between the coequal arms of the National Government," *id.* at 473, claims like respondents' should only be entertained as a "last resort," *id.* at 474, and upon the firmest conviction that the constitutional requirements for judicial intervention under Article III have been satisfied.

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger, 418 U.S. at 222. That principle applies with particular force when, as here, taxpayers seek judicial superintendence of the speeches and daily activities not just of agency officials, but also of presidential staff within the Executive Office of the President acting pursuant to a presidential directive.

To require, as the court of appeals did, only the presence of federal funding within the government paired with an Establishment Clause objection not only would loose taxpayer standing from its constitutional, historic, and precedential moorings, but also would disregard those constitutional constraints and would go far towards establishing the courts, at the behest of any one of the more than 180 million taxpayers in the United States, as a standing Council of Revision for every governmental encounter with religion. See *Richardson*, 418

U.S. at 189 (Powell, J., concurring). "[S]uch a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in [this Court's] precedent and *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106). Indeed, if interpreted in that open-ended fashion, *Flast* could not stand with the precedents of this Court—both before and after *Flast*—that hew to Article III's limits on taxpayer standing.

In addition, such a dramatic expansion of taxpayer standing would likely sow additional confusion in courts that already struggle with the scope and application of this Court's taxpayer standing jurisprudence. As Judge Easterbrook explained, the court of appeals' decision in this case creates line-drawing problems that not only suggest that the court's conception of taxpayer standing lacks "coherence," but also—if deemed to be a proper reading of *Flast*—"suggest[] problems in *Flast*'s underpinning and application." Pet. App. 62a (Easterbrook, J., concurring in the denial of rehearing en banc). Indeed, within three months of the court of appeals' decision in this case, the Seventh Circuit loosened the reins on taxpayer standing even further, holding that taxpayer standing supports suits for equitable restitution against private entities. See *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir.), as amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006). Accordingly, adopting the court of appeals' reading of *Flast* could require the Court to revisit *Flast* and the doctrine of taxpayer standing altogether. If something has to give way to make the law in this area administrable, it should be the narrow anomaly of *Flast*,

not Article III and its bedrock requirement of particularized injury.[17]

While itself the subject of judicial and scholarly criticism, *Flast* has survived as a "stringently limited" exception to the general prohibition against taxpayer standing. *Richardson*, 418 U.S. at 194 (Powell, J., concurring). Eliminating the concrete boundaries established by *Flast*—in particular, the unique historical concern about imposing taxes to subsidize the religious exercise of churches and similar entities—would call into question the legitimacy of *Flast* itself. The Court need not undertake that examination in this case, however, if it retains its view of *Flast* as a narrow exception and reverses the court of appeals' holding that taxpayer standing extends to challenges to Executive Branch activities that are financed only indirectly through general appropriations and that do not entail the congressionally directed disbursement of federal funds to institutions or individuals outside the government.

---

[17] Many jurists and scholars—beginning with Justice Harlan in his dissent in *Flast*—have questioned whether the *Flast* exception can be squared with the fundamental separation of powers principles that compel the general rule against taxpayer standing. See, *e.g.*, *Richardson*, 418 U.S. at 180-197 (Powell, J., concurring); *id.* at 183 n.2 ("Mr. Justice Harlan's criticisms of the Court's analysis in *Flast* have been echoed by several commentators.") (citing articles); *Flast*, 392 U.S. at 116-133 (Harlan, J., dissenting); see generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suff. U. L. Rev. 881 (1983); Kenneth E. Scott, *Standing in the Supreme Court–A Functional Analysis*, 86 Harv. L. Rev. 645 (1973); Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After* Flast *v.* Cohen, 36 U. Chi. L. Rev. 364 (1969).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

JANUARY 2007

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

GIOVANNA SHAY
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
CHARLES A. ROTHFELD
ELIZABETH G. OYER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

RICHARD L. BOLTON
Counsel of Record
Boardman, Suhr, Curry & Field LLC
One South Pinckney Street
Madison, WI 53703
(608) 257-9521

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the standing principle recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), and reaffirmed unanimously in *Bowen* v. *Kendrick*, 487 U.S. 605 (1988), permits taxpayers to challenge on Establishment Clause grounds an expenditure of funds pursuant to a congressional appropriation when that expenditure is fairly traceable to the allegedly unconstitutional conduct.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

A. Background 3

B. The District Court's Decisions. 8

C. The Court Of Appeals' Decision. 9

SUMMARY OF ARGUMENT 12

ARGUMENT 15

RESPONDENTS HAVE STANDING AS FEDERAL TAXPAYERS TO CHALLENGE THE FAITH-BASED OFFICES' PROGRAM TO DIRECT MORE FEDERAL GRANTS TO RELIGIOUS ORGANIZATIONS. 15

A. To Maintain A Claim Under *Flast*, The Taxpayer Must Demonstrate That The Challenged Expenditure Is Fairly Traceable To The Alleged Unconstitutional Conduct. 19

B. *Flast* And Its Progeny Recognize Taxpayer Standing To Challenge Discretionary Spending Decisions By The Executive Branch With Respect To Funds Appropriated By Congress. 22

1. *Flast* Itself Upheld Taxpayers' Standing To Challenge Discretionary Spending Decisions By The Executive Branch. 22

2. *Kendrick* Rejected The Precise Argument Advanced By The Government Here. 25

TABLE OF CONTENTS—continued

Page

3. The Discretion Exercised By The Executive Branch With Respect To Spending Decisions Not Tied To A Congressional Program Is Indistinguishable From The Discretion Involved In The Challenged Decisions In *Flast* And *Kendrick*. 27

   a. The government's test would preclude taxpayers from challenging a broad range of expenditures that inflict the precise injury that the Framers sought to prevent. 28

   b. The existence of a congressional "program" is irrelevant to the taxpayer's substantive claim. 31

   c. The government's "program" test is standardless. 31

   d. *Flast* requires a congressional appropriation, not a congressional program. 32

4. The Other Decisions Relied Upon By The Government Provide No Support For Prohibiting Taxpayer Challenges To Discretionary Spending Decisions By The Executive Branch. 35

5. The History Of The Establishment Clause Demonstrates That Its Framers' Concerns Encompassed All Government Spending In Support Of Religion. 38

TABLE OF CONTENTS—continued

Page

C. Taxpayers' Standing To Assert Establishment Clause Challenges Is Not Restricted To Grants Of Government Funds To Third Parties. 42

D. The Government's Proposed Restrictions Are Not Justified By General Standing Principles Or Separation Of Powers Concerns 46

1. *Flast* Is Entirely Consistent With General Standing Principles. 46

2. Existing Principles Governing Taxpayer Standing Prevent Intrusion On Legitimate Separation of Powers Interests. 47

E. The Amended Complaint Alleges Facts Sufficient To Establish Respondents' Standing As Taxpayers To Challenge The Expenditures At Issue In This Action. 48

CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. *Felton*, 521 U.S. 203 (1997) 16

Aguilar v. *Felton*, 473 U.S. 402 (1985) 16

Allen v. *Wright*, 468 U.S. 737 (1984) 20

Andrus v. *Sierra Club*, 442 U.S. 347 (1979) 34

Bowen v. *Kendrick*, 487 U.S. 605 (1989) ..... *passim*

Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 16

DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) ..... *passim*

Danzl v. *City of Bismarck*, 451 N.W. 2d 127 (N.D. 1990) 48

Doremus v. *Board of Education*, 342 U.S. 429 (1952) 21, 38

Everson v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947) 19

Flast v. *Cohen*, 392 U.S. 83 (1968) ..... *passim*

Hibbs v. *Winn*, 542 U.S. 88 (2004) 16

Hunt v. *McNair*, 413 U.S. 734 (1973) 16

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) 43

Kirk v. *Clark*, 4 S.E.2d 13 (S.C. 1939) 48

Laskowski v. *Spellings*, 443 F.3d 930, amended on reh'g, 456 F.3d 702 (2002), petition for cert. pending, No. 06-582 18

Levitt v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) 16

Louisiana Associated General Contractors, Inc. v. *Calcasieu Parish School Board*, 586 So. 2d 1354 (1991) 48

TABLE OF AUTHORITIES—continued

Page(s)

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 12, 16, 17

Marsh v. *Chambers*, 463 U.S. 783 (1983) 43

MD/DC/DE Broadcasters Ass'n v. *FCC*, 236 F.3d 13 (D.C. Cir. 2001) 15

Meek v. *Pittenger*, 421 U.S. 349 (1975) 16

Mitchell v. *Helms*, 530 U.S. 793 (2000) 16, 27, 45

Monterey Mechanical Co. v. *Wilson*, 125 F.3d 702 (9th Cir. 1997) 15

Monterey Mechanical Co. v. *Wilson*, 138 F.3d 1270 (9th Cir. 1998) 15

Mueller v. *Allen*, 463 U.S. 388 (1983) 16

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 28

Public Citizen, Inc. v. *Simon*, 589 F.2d 211 (D.C. Cir. 1976) 18

Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 16

Safeco Insurance Co. of America v. *City of White House*, 191 F.3d 675 (6th Cir. 1999) 15

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) 35, 36

School District of Grand Rapids v. *Ball*, 473 U.S. 373 (1985) 16, 27

Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 16, 20, 21

Sloan v. *Lemon*, 413 U.S. 825 (1973) 16

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 16

TABLE OF AUTHORITIES—continued

Page(s)

Tilton v. *Richardson*, 403 U.S. 672 (1971) 16
United States v. *Richardson*, 418 U.S. 166 (1974) 35, 36
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) ..... *passim*
Van Orden v. *Perry*, 545 U.S. 844, 125 S. Ct. 2854 (2005) 21
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 45
Washington ex rel. Boyles v. *Whatcom County Superior Court*, 694 P.2d 27 (Wash. 1985) 48
Williams v. *Lara*, 52 S.W.3d 171 (Tex. 2000) 48
Wolman v. *Walter*, 433 U.S. 229 (1977) 16
Zeigler v. *Baker*, 344 So. 2d 761 (Ala. 1977) 48
Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002) 16

STATUTES, RULES AND REGULATIONS

U.S. Const. Art. I, sec. 6 36
U.S. Const. Art. I, sec. 8 ..... 17, 28
3 Cong. Ch. 6, 1 Stat. 342 (1794) 41
28 U.S.C. § 1254(1) 1
39 U.S.C. § 2401 33
39 U.S.C. § 3621 33
Adolescent Family Life Act, 95 Stat. 578, 42 U.S.C. § 300z, *et seq.* 25
42 U.S.C. § 629i 7
Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 22
Pub. L. No. 107-116, 115 Stat. 2177, 2196 (2002) 31

TABLE OF AUTHORITIES—continued

Page(s)

Pub. L. No. 109-115, 119 Stat. 2396, 2472 (2005) 42
Exec. Order No. 13,198, 3 C.F.R. at 750 (2002)..... 3
Exec. Order No. 13,199, 3 C.F.R. at 752 (2002)..... 3
Exec. Order No. 13,279, 3 C.F.R. at 258 (2003)..... 4
Exec. Order No. 13,280, 3 C.F.R. at 263 (2003)..... 3

MISCELLANEOUS

1 ANNALS OF CONGRESS (Joseph Gales ed., 1789)..... 41
3 ANNALS OF CONGRESS (1793) 41
Brief of Appellant, *Bowen* v. *Kendrick*, 487 U.S. 605 (1988) (No. 87-253), 1988 WL 1031759 26
Brief of Appellants, *Flast* v. *Cohen*, 392 U.S. 83 (1968) (No. 416), 1967 WL 113846..... 22, 23, 24
Brief of Appellees, *Flast* v. *Cohen*, 392 U.S. 83 (1968) (No. 416), 1968 WL 129299..... 23, 24
Brief of Petitioner, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (No. 72-1188), 1973 WL 183884 36
Brief of Petitioners, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (No. 80-327), 1981 WL 390380..... 37
Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 185 (2004)..... 39
Comptroller General of the United States, TERMS USED IN THE BUDGETARY PROCESS (1977)..... 34

TABLE OF AUTHORITIES—continued

Page(s)

GAO, FAITH-BASED AND COMMUNITY INITIATIVE (June 2006), *available at* http://www.gao.gov/new.items/d06616.pdf 5, 6

GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, (3d ed. 2004), *available at* http://www.gao.gov/special.pubs/d04261sp.pdf 32

GAO, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, (3d ed. Feb. 2006), *available at* http://www.gao.gov/special.pubs/d06382sp.pdf 30

Letter from Thomas Jefferson to Rev. Samuel Miller, *in* THOMAS JEFFERSON: WRITINGS (Merrill D. Peterson ed., 1994) 39

Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099 (2004) 39

18 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 52.14 (3d ed.) 48

THE FEDERALIST NO. 58 (Rossiter ed., 1961) 41

5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) 40, 41

Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 PAPERS OF THOMAS JEFFERSON (Julian P. Boyd et al. eds., 1950) 40

United States Postal Service, 2005 ANNUAL REPORT, *available at* www.usps.com/history/anrpt05/usps_ar05.pdf 33

TABLE OF AUTHORITIES—continued

Page(s)

UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (Aug. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf 4, 5

1 William Blackstone, COMMENTARIES 39

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc and the accompanying concurring and dissenting opinions (Pet. App. 58a-66a) are reported at 447 F.3d 988. The opinion of the district court granting the government's partial motion to dismiss the complaint (Pet. App. 27a-35a) and the opinion of the district court granting partial summary judgment in favor of respondents and partial summary judgment in favor of the government (Pet. App. 36a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2006. A petition for rehearing was denied on May 3, 2006 (Pet. App. 59a). The petition for a writ of certiorari was filed on August 1, 2006, and the petition was granted on December 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The standing principle recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), rests firmly on one of the central purposes of the Establishment Clause: preventing government from using its taxing power to force citizens to provide financial support for religion. Moreover, as the Court recognized last Term in *DaimlerChrysler* v. *Cuno*, 126 S. Ct. 1854 (2006), *Flast*'s rationale fits comfortably with this Court's general standing jurisprudence. This Court most recently addressed the principle in *Bowen* v. *Kendrick*, 487 U.S. 605 (1989), unanimously rejecting an attempt by the government to narrow the doctrine on grounds virtually identical to those it advances here. The claim here is in all material respects identical to the claims permitted in *Flast* and *Kendrick*.

Although the government does not point to an increase in unjustified taxpayer claims under the Establishment Clause, it frames this case in cataclysmic terms, asserting that the holding below threatens to "establish[] the courts, at the behest of any one of the more than 180 million taxpayers in the United States, as a standing Council of Revision for every governmental encounter with religion" (Pet. Br. 47). It proposes restrictions on standing that would dramatically constrict current law – exempting *all* expenditures of discretionary funds and *every* expenditure other than grants to religious organizations – thereby precluding a broad range of taxpayer claims seeking redress for the precise injury that was at the heart of the Framers' concern about government support of religion.

The government's dire predictions rests on a misunderstanding of the claim in this case, the holding below, and current law. This case does not involve a challenge to every government official's ability to "speak favorably about religion or * * * meet with representatives of religious groups" (Pet. Br. 39). It involves, in the court of appeals' words, the claim that although petitioners assert that their conferences and other activities are designed "to promote community organizations whether secular or religious," "in fact the conferences are designed to promote religious community organizations over secular ones." Pet. App. 9a. The court of appeals' holding does not open the door to lawsuits challenging a particular speech; the court of appeals held that respondents had *no standing* to assert such a claim. *Id.* at 14a-15a.

Finally, the government ignores the existing limits on taxpayer standing that require the taxpayer to show that his injury – the challenged expenditure of federal funds – is fairly traceable to the conduct that allegedly violates the Establishment Clause. This familiar standing principle will screen out the attenuated claims that the government fears – if anyone chooses to bring them. There simply is no warrant

for the arbitrary, extraordinarily broad cut-back in taxpayer standing sought by the government here.

A. Background

1. Petitioners are the director of the White House Office of Faith-Based and Community Initiatives and the directors of similar Offices in the Departments of Justice, Labor, Education, Health and Human Services, Housing and Urban Development, and Agriculture and in the Agency for International Development ("FBCI Offices"). The White House FBCI Office was established by Executive Order in January 2001 and given "lead responsibility in the executive branch to establish policies, priorities, and objectives of the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law." Exec. Order No. 13,199, 3 C.F.R. § 2, at 752 (2002). The Executive Order identifies twelve "principal functions" to be carried out by the Office and states that the Office "shall have a staff to be headed by the Assistant to the President for Faith-Based and Community Initiatives" and "shall have such staff and other assistance to the extent permitted by law, as may be necessary to carry out the provisions of this order." *Id.* § 3, 4(b), at 753.

The Executive Orders establishing the FBCI Offices in the Departments and in the Agency for International Development similarly identify specific responsibilities for the Offices, state that each Office "shall be supervised by a Director, appointed by the department head" in consultation with the White House FBCI Office, and require the relevant agency to "provide its Center with appropriate staff, administrative support, and other resources to meet its responsibilities under this order." Exec. Order No. 13,198, 3 C.F.R. § 2(b), (c), at 750 (2002); Exec. Order No. 13,280, 3 C.F.R. § 2, at 263 (2003).

Nearly two years after establishing the first FBCI Offices, the President issued an Executive Order "to ensure equal protection of the laws for faith-based and community organizations." Exec. Order No. 13,279, 3 C.F.R. § 2, at 258 (2003). It bars discrimination on the basis of religion in the distribution of federal grants, prohibits grant recipients from discriminating on the basis of religion, requires organizations that engage in religious activities to separate those services in time and space from any programs supported with federal funds, and permits faith-based organizations to participate in federal grant programs "without impairing their independence, autonomy, expression, or religious character." *Id.* § 2(f), at 260.

A report issued by the White House in August 2001 – seven months after the first FBCI Offices were established – "summarize[d] the initial findings" by these Offices "on barriers impeding religious and grassroots organizations that seek to serve the common good in collaboration with the Federal Government." UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 1 (Aug. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf.

The report discussed available data regarding the percentage of federal grants to nonprofit organizations that were awarded to "community-based groups" and to "faith-based groups." Of the ten grant categories discussed in the report, seven listed only the percentage of grants awarded to faith-based organizations. *Id.* at 5-7.

The report went on to identify "barriers" preventing these groups from obtaining federal grants. For example, although recognizing that "some restrictions on how religious organizations can spend government grants are plainly required by the Constitution," the report condemned "excessive

restrictions" that "unnecessarily and improperly limit the participation of faith-based organizations." *Id.* at 13, 14.[1]

The Government Accountability Office in June 2006 issued a report on the activities of five FBCI Offices – those at the Departments of Health and Human Services, Education, Justice, Labor, and Housing and Urban Development. See GAO, FAITH-BASED AND COMMUNITY INITIATIVE (June 2006), *available at* www.gao.gov/new.items/d06616.pdf (hereinafter "GAO REPORT"). That report observed that the White House FBCI Office had collected and published data concerning awards of federal grants to faith-based organizations documenting a 38% increase in the number of grants and a 21% increase in funding between fiscal years 2003 and 2005. *Id.* at 43. The White House Office "has not reported on the participation of community-based organizations." *Id.* at 8.

2. The activities of the various FBCI Offices are funded through appropriations laws enacted by Congress. The GAO Report explained that these funds are obtained from different accounts established by the relevant Department's appropriation statute:

> Education's center receives its funding through the Office of the Secretary of Education and HUD's center receives its funding through HUD's salaries and expenses account, while Justice's and HHS's centers are funded through internal agencies such as the Office of Justice Programs in Justice and the Administration for Children and Families in HHS. Labor's center receives funds from both its agency's

[1] The report also criticized a program that improperly limited participation to faith-based groups. *Id.* at 22. Interestingly, ten pages of the report – fully two-thirds of the total discussion of specific "barriers" – are devoted to the particular barriers faced by faith-based organizations. *Id.* at 10-20.

> departmental management account and from program offices.

Id. at 21. "[A]lthough not required to, HHS has included information on funding for its [Office] as part of its congressional budget request for several years, while HUD and Labor have included similar information in past budget requests. These agencies have in turn received guidance from Congress in the past on the amount of resources to allocate to their [Offices]." *Ibid.*[2]

The FBCI Offices of five Departments – Justice, Education, Labor, HHS, and HUD – "estimated [for GAO] that they cumulatively spent more than $24 million on administrative activities related to the initiative" for fiscal years 2002-2005. *Id.* at 19-20. These estimates "do not include other federal initiative-related expenditures, such as the administrative costs associated with program offices' efforts to assist faith-based and community organizations." *Id.* at 21 (footnote omitted).

3. The Freedom From Religion Foundation, Inc., and several of its members – all of whom are respondents in this Court – commenced this action against petitioners and other government officials in June 2004 alleging several distinct violations of the Establishment Clause.

First, respondents alleged that petitioners organized conferences regarding federal grant programs that were intended to and had the effect of "preferentially promot[ing] and advocat[ing] a climate conducive to funding for faith-based organizations, without similar advocacy for secular community-based organizations." Pet. App. 76a (Amended Complaint ¶ 36). Petitioners' actions "endors[ed] a preference

---

[2] The GAO further observed that "Education and Justice have provided limited or no information on their [Offices'] funding to Congress as part of their budget requests. In turn, these agencies have not received guidance from Congress on the amount of resources to allocate to their [Offices]." GAO REPORT at 21.

for the funding of faith-based organizations." *Id.* at 77a (¶ 40); see also *ibid.* (¶ 39) (petitioners "organize[d], set up and conduct[ed] such public events to advance funding for faith-based organizations"); *id.* at 79a (¶¶ 44 & 45). As the court of appeals explained, "[t]he stated goal of the conferences is to promote community organizations whether secular or religious," but "[t]he plaintiffs claim that in fact the conferences are designed to promote religious community organizations over secular ones." *Id. at* 9a.

The amended complaint cites several specific events as evidence of the alleged purpose and effect of the conferences, including speeches "tout[ing] the allegedly unique capacity of faith-based organizations to provide effective social services, including by singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations" (Pet. App. 75a (¶ 34); and specific grants that were the result of "preferential[] fund[ing]" of faith-based organizations (*id.* at 78a (¶ 42)). See also *id.* at 10a (court of appeals concluded that the complaint "portrays the conferences organized by the various [Offices] as propaganda vehicles for religion").

Second, respondents identified eight instances in which federal grant recipients "directly and preferentially funded with Congressional taxpayer appropriations" used those funds for services that "integrate religion as a substantive and integral component" in violation of the Establishment Clause. Pet. App. 78a (¶ 42). One of these was a grant to MentorKids USA by the Department of Health and Human Services under the Mentoring Children of Prisoners grant program (see 42 U.S.C. § 629i).

Third, respondents alleged that the Secretary of Health and Human Services "funded intermediary faith-based organizations that preferentially award sub-grants to other faith-based organizations," citing the "funding for the Interfaith Health Program of Rollins School of Public Health at Emory University, under a Department of Health and Human

Services' Compassion Capital Grant, which grantee does not utilize objective criteria in making sub-awards." Pet. App. 79a (¶ 43). Respondents alleged that these grants violated the "principle of neutrality" mandated by the Establishment Clause. *Ibid.*

Respondents contended that they had standing to assert these claims based on the individual respondents' status as federal taxpayers (Pet. App. 68a-69a (¶¶ 7-9)) and the Foundation's status as a representative of its members who are federal taxpayers (*id.* at 68a (¶ 5)). They also alleged that all of the challenged activities were funded by appropriations enacted by Congress pursuant to its authority under Article I, Section 8 of the United States Constitution. *Id.* at 69a-72a (¶¶ 11-24), 73a (¶ 32), 76a (¶ 36), 77a (¶¶ 39 & 41), 78a-79a (¶¶ 42-44).

Respondents sought a declaratory judgment, an order enjoining the defendants from using appropriations in violation of the Establishment Clause, and an order requiring the defendants to establish rules to ensure that future appropriations were not used in violation of the Establishment Clause. Pet. App. 80a.

B. The District Court's Decisions.

The district court granted petitioners' motion to dismiss with respect to the claim involving the activities of the FBCI Offices. Pet. App. 27a-35a. It held that respondents' status as federal taxpayers did not give them standing to pursue this claim. The court reasoned that because the FBCI Offices are "funded * * * with general budget appropriations," they are not "charged with the administration of a congressional program. Consequently, [their] actions are not 'exercises of congressional power' as required by the *Flast* test." *Id.* at 33a, 34a; see also *id.* at 34a (respondents "do not have standing to challenge the actions of [petitioners] because their actions do not represent congressional power as required by the *Flast* test").

Subsequently, the district court granted partial summary judgment for the government and partial summary judgment for respondents with respect to the other claims. Pet. App. 36a-57a. As to the grant to Emory University by the Department of Health and Human Services under the Compassion Capital Fund program, the court held that there was no proof of alleged bias in selecting grantees or sub-grantees. *Id.* at 50a-55a.

With respect to the claim that MentorKids USA was using federal funds to promote religion, the court observed that "[c]onfronted with the evidence produced by [respondents] in their motion for summary judgment, [the government] acted on December 16, 2004 to suspend further funding" of the grant. Pet. App. 55a. "Effectively conceding that federal funds have been used by the MentorKids program to advance religion in violation of the Establishment Clause, [the government does] not attempt to set forth specific facts to show that there is a genuine issue for trial. Accordingly, [respondents] are entitled to judgment as a matter of law." *Id.* at 56a.[3]

C. The Court Of Appeals' Decision.

The court of appeals reversed the district court's holding that respondents lacked standing to challenge the activities of the FBCI Offices. Pet. App. 1a-26a. The court, speaking through Judge Posner, explained that "[t]he difference * * * between this case on the one hand and *Flast* and *Kendrick* on the other is that the expenditures in those cases were pursuant to specific congressional grant programs, while in this case

[3] Respondents did not pursue their claims with respect to other grants. Respondents voluntarily dismissed the claims against the director of the FBCI Office at the Corporation for National and Community Service. The district court dismissed respondents' claims against former Secretary of Education Rod Paige, and the court of appeals affirmed that determination. Pet. App. 14a-15a, 35a.

there is no statutory program, just the general 'program' of appropriating some money to executive-branch departments without strings attached. The difference cannot be controlling." *Id.* at 11a.

The court rejected the government's argument that taxpayers have standing only to challenge grants to third parties: "[t]he line proposed by the government * * * would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause * * * without making outright grants to religious organizations. For the government to operate a mosque or other place of worship would not involve a grant unless a contractor was involved." Pet. App. 13a.

A taxpayer has standing to raise an Establishment Clause challenge to an expenditure, the court stated, if the funds in question are derived "from exercises of Congress's spending power." Pet. App. 11a. Here, "the objection is to a program for which money undoubtedly is 'appropriated,' albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly." *Id.* at 12a.

The court of appeals observed that this Court in *Flast* "carved an exception [to taxpayer standing] for 'an incidental expenditure of tax funds in the administration of an essentially regulatory statute.'" Pet. App. 13a (quoting *Flast*, 392 U.S. at 102). Noting that "incidental" is "a relative term" whose meaning "depends on what it is deemed incidental to," the court concluded that incidental did not mean the size of the challenged expenditure compared to the overall federal budget or to the budget of a particular Department, but instead "should be reserved for such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion." *Id. at* 14a.

Accordingly, the Court concluded, its analysis "would not permit an individual citizen to challenge just any action

of the executive with which he disagrees as a violation of the establishment clause." Pet. App. 14a. The plaintiff would have to show an expenditure of federal funds tied to the challenged activity – "[f]ederal employees employed in programs of unquestioned constitutionality cannot be sued by taxpayers simply because they divert some of their work to improper purposes" (*id.* at 15a) – and the expenditure may not be incidental. Here, because respondents challenged the FBCI program itself as unconstitutional, "the fact that it was funded out of general rather than earmarked appropriations – that it was an executive rather than a congressional program – does not deprive taxpayers of standing to challenge it. Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order." *Id.* at 16a.

Judge Ripple dissented. Pet. App. 16a-26a. He concluded that "*Flast* * * * remains necessary to allow challenges to situations in which Congress makes no public endorsement of religion but nevertheless supports a sectarian cause through the transfer of public funds" because of "the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion. Beneficiaries of such spending have no incentive to sue, and non-beneficiary outsiders cannot show a direct injury." *Id.* at 22a, 20a. He disagreed with the majority's conclusion that the *Flast* rule encompassed the claim in this case, however, asserting that it "makes virtually any action subject to taxpayer suit." *Id.* at 24a.

The full court of appeals denied the government's petition for rehearing en banc by a 7-4 vote. Pet. App. 58a-66a.

SUMMARY OF ARGUMENT

This Court in *Flast* recognized that one of the "specific evils" feared by the Framers of the Establishment Clause was that "the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. That practice had been prevalent both in Europe and in the colonies, and the injury for which *Flast* permits redress is the injury that was at the core of the Framers' concern – the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106).

The claim permitted by *Flast* is unique in that the expenditure of government funds in violation of the Establishment Clause itself satisfies Article III's injury requirement But the presence of government funding alone is not enough to establish standing. The taxpayer must show a sufficiently close connection between the challenged expenditure and the conduct alleged to violate the Clause. This requirement of a sufficient causal connection arises in a myriad of contexts, and the general principle from the Court's standing jurisprudence – that the injury must be "fairly traceable" to the challenged conduct (*Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 590 (1992)) – supplies the guiding principle in this context as well.

Requiring an expenditure that is fairly traceable to the conduct violative of the Establishment Clause enables taxpayers to seek redress in situations in which there is a definite link between the expenditure of government funds and religion. At the same time, this requirement precludes claims in which that connection is attenuated and the government spending could not reasonably induce in a taxpayer the concern about compelled exaction of funds for religious purposes that was the focus of the Framers' attention. It also harmonizes the *Flast* inquiry with general standing principles and accommodates separation of powers concerns by precluding attenuated claims.

The government ignores this conventional standing principle and argues instead that the Court should impose arbitrary – and very substantial – limitations that would bar taxpayers from challenging expenditures at the core of the Framers' concern and that have no logical connection to Establishment Clause principles or general standing doctrine. It claims this dramatic step is necessary to avoid a flood of Establishment Clause challenges to "virtually everything" the executive branch does (Pet. Br. 30). In fact, the bar on attenuated claims grounded in general standing principles precludes the litigation torrent that the government fears. There is no warrant for the radical revision of *Flast* that the government seeks.

First, the government urges the Court to hold that taxpayers may challenge disbursements violative of the Establishment Clause if they allege "that *Congress* exceeded its taxing and spending authority in [some] respect" (Pet. Br. 25 (emphasis in original)). This Court rejected the identical argument in *Kendrick*, and should do so here as well. Indeed, *Flast* and *Kendrick* both involved challenges to discretionary spending decisions by the executive branch.

The government attempts to distinguish these precedents by arguing that discretionary expenditures pursuant to a congressional "program" are different from other discretionary disbursement decisions. But the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast* – the expenditure for the support of religion of funds exacted from taxpayers. And constricting taxpayer claims in this manner would produce an exclusion of staggering proportions, exempting a broad range of unconstitutional expenditures. Finally, the government's limitation makes no sense: a taxpayer cannot argue that the challenged expenditure violated limits imposed by Congress; he may raise only an Establishment Clause challenge. Requiring the existence of a congressional program is a purely arbitrary limitation on taxpayer standing that has nothing to do with the substantive

claims the taxpayer may assert. The government cannot point to a single case in which the Court has denied taxpayer standing on this basis.

The government's position is also sharply inconsistent with the history on which the *Flast* Court relied. Given their knowledge of English history, the Framers were well aware of the potential for abuse of executive power in the area of religion, which included coerced payment of funds that were used by the monarch to aid religion. There simply is no basis for concluding that they were *less* concerned about exercises of executive discretion than about the actions of Congress.

Second, the government proposes a new rule allowing taxpayers to challenge *only* disbursements of appropriated funds to third parties. All other expenditures would be immune from challenge by taxpayers. Again, however, the injury suffered by the taxpayer in both situations is the precise injury identified in *Flast*; it does not matter whether the government awards a grant for the purchase of religious materials or instead buys the materials and then distributes them. Again, the government's proposed rule would exempt a broad swath of unconstitutional expenditures.

The government's rule is also squarely inconsistent with the relevant history. Under the government's theory, Madison would have withdrawn his Remonstrance – and had no objection to the Virginia statute providing funds for the hiring of religion teachers – if only the statute had been drafted to make the teachers state employees rather than employees of the church. In fact, of course, it was the use of the government funds to which Madison objected, not the particulars of the employment relationship.

Flast rests firmly on the Framers' intentions and has been applied by this Court in a long line of decisions. Conventional standing principles establish limits that preclude the horribles hypothesized by the government. This Court should reject the government's invitation to reject its prece-

dents, and instead reaffirm the taxpayer standing principle together with the existing limitations on that principle.

ARGUMENT

RESPONDENTS HAVE STANDING AS FEDERAL TAXPAYERS TO CHALLENGE THE FAITH-BASED OFFICES' PROGRAM TO DIRECT MORE FEDERAL GRANTS TO RELIGIOUS ORGANIZATIONS.

The complaint alleges that the FBCI Offices spent appropriated funds to hold a series of conferences that – although assertedly neutral between religious and non-religious organizations – in fact were designed to give a preference to religious organizations with respect to awards of federal grants. To prevail on that claim, respondents will have to establish the relevant facts regarding the conferences as well as to demonstrate that the conferences did not constitute permissible outreach efforts.[4]

The issue before the Court is not the merits of respondents' claim – or even whether that claim is pled adequately

---

[4] Respondents' claim is thus analogous to arguments raised in other contexts that programs framed as requiring only enhanced outreach to women and minorities by government entities or government contractors in connection with employment or contracting in fact are disguised preferences. Compare *Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702 (9th Cir. 1997) (invalidating statute as impermissible preference), with *Monterey Mech. Co.* v. *Wilson*, 138 F.3d 1270 (9th Cir. 1998) (Reinhardt, J., joined by Pregerson and Tashima, JJ., dissenting from denial of rehearing en banc) (characterizing statute as good faith outreach effort); see also *MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13 (D.C. Cir. 2001) (affirmative outreach rule violated equal protection); *Safeco Ins. Co. of America* v. *City of White House*, 191 F.3d 675, 691 (6th Cir. 1999) (EPA minority contractor outreach requirements challenged as impermissible preference; government may not avoid strict scrutiny review simply "by invoking the phrase 'good-faith effort to solicit'").

in the complaint. It is whether respondents' status as federal taxpayers gives them standing to assert such a claim.

The Court has explained that "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must demonstrate "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations, footnote, and internal quotation marks omitted). Second, the plaintiff must show "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court." *Ibid.* (alterations and omission in original) (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998) ("triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement").

In *Flast* v. *Cohen*, *supra*, this Court held that a taxpayer had standing to assert an Establishment Clause challenge to an expenditure of funds appropriated by Congress. Since *Flast*, the Court has repeatedly relied upon plaintiffs' status as state or federal taxpayers to justify reaching the merits of Establishment Clause claims. See, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 94 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648 (2002); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203, 212 (1997); *Aguilar* v. *Felton*, 473 U.S. 402, 407 (1985); *Sch. Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 380 (1985); *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983); *Wolman* v. *Walter*, 433 U.S. 229, 232 (1977); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 744 (1976); *Meek* v. *Pittenger*, 421 U.S. 349, 355 n.5 (1975);

Sloan v. *Lemon*, 413 U.S. 825, 826 (1973); *Comm. for Pub. Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 762 (1973); *Hunt* v. *McNair*, 413 U.S. 734, 735 (1973); *Levitt* v. *Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 478 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 676 (1971).

The Court explained just last Term in *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854 (2006), that a taxpayer's claim that an expenditure violates the Establishment Clause satisfies the first two elements of the standing test because the taxpayer's injury is "the very 'extract[ion] and spen[ding] of 'tax money' in aid of religion." 126 S. Ct. at 1865. That injury can be redressed by "an injunction against the spending," and therefore satisfies the third standing requirement discussed in *Lujan*. *Ibid.* See also pages 46-47, *infra*.

Flast identified two basic elements necessary to establish standing as a taxpayer. The taxpayer may "allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause" and must assert a challenge under the Establishment Clause. 392 U.S. at 102-03. The complaint here challenges expenditures of funds appropriated by Congress pursuant to its authority under Article I, section 8 of the Constitution and respondents claim that those funds were expended in violation of the Establishment Clause.

The presence of government funding alone is not sufficient to establish a taxpayer's standing to assert an Establishment Clause claim. The Court in *Flast* noted that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102. That was an expression of the principle – stated more generally in the causation element of *Lujan* – that there must be a "fairly traceable" link between the challenged conduct and the injury. A taxpayer accordingly must show that the challenged expenditures are fairly traceable to the conduct alleged to violate the Establishment Clause.

Essentially ignoring this limitation, the government asserts that the Court should adopt two new restrictions on the *Flast* principle – that a plaintiff must "allege that *Congress* exceeded its taxing and spending authority in [some] respect" (Pet. Br. 25 (emphasis in original)) and that the challenged expenditure involves only "the disbursement of funds to entities outside the government" (*id.* at 44).

The new restrictions sought by the government are not necessary to preclude Establishment Clause challenges to "virtually everything" the executive branch does (Pet. Br. 30) or any of the other horribles in the government's parade. There is no flood of Establishment Clause plaintiffs asserting novel theories of taxpayer standing engulfing the federal courts. The government's certiorari petition cites only two appellate decisions – one decided in 1978 and one decided in 1989 – involving claims under the Establishment Clause. Pet. App. 23a-24a.[5] The existing rules governing taxpayer standing already prevent the intrusion into executive prerogatives that the government fears, while maintaining taxpayers' ability to vindicate the critical guarantee of the First Amendment that taxpayer funds be used for religious purposes.

---

[5] The government also cites *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976), which did not involve an Establishment Clause claim. The government references (Pet. Br. 48) the Seventh Circuit's decision in *Laskowski* v. *Spellings*, 443 F.3d 930, amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582. But that case presents no issue regarding taxpayer standing; the issue is the scope of relief available in actions brought by taxpayers. That issue could and would arise regardless of the Court's resolution of the question presented here.

A. To Maintain A Claim Under *Flast*, The Taxpayer Must Demonstrate That The Challenged Expenditure Is Fairly Traceable To The Alleged Unconstitutional Conduct.

Flast vindicates one of the core protections of our Constitution:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison * * * observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

392 U.S. at 103 (citation omitted). "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947).

Unfortunately, "[t]hese practices of the old world were transplanted to and began to thrive in the soil of the new America. [Charters granted by the Crown] * * * authorized * * * religious establishments which all, whether believers or non-believers, would be required to support and attend. * * * The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the colonists'] indignation. It was these feelings that found expression in the First Amendment." *Id.* at 9-11 (footnotes omitted).

The injury for which *Flast* permits redress is the injury that was at the core of the Framers' concern – the "'ex-

tract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 106). The Court employs the "fairly traceable" standard in a variety of contexts to ensure a sufficiently close link between the injury and the challenged conduct, denying standing where the relationship is too attenuated. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984); *Simon*, 426 U.S. at 41-42.

In the context of an Establishment Clause claim, the taxpayer must establish the necessary link between the unconstitutional conduct and the challenged expenditure. The "fairly traceable" standard determines whether that relationship is sufficient to support standing.[6]

A challenge to a grant, contract, or other award of federal funds to a third party on the ground that the recipient's use of the funds violates the Establishment Clause always will satisfy this standard, because an identifiable expenditure is clearly linked to the challenged conduct – it is the impermissible use of those particular funds that is the alleged violation. Indeed, this Court has routinely found standing to assert such claims. See pages 16-17, *supra*.

The same would be true of a challenge to a set of activities that are expressly denominated a program – whether by Congress or by an agency. The expenditures attributable to the program are clearly linked to the challenged activity. A claim that the government hired an employee to engage in impermissible activities suffices for the same reasons

In other situations, the facts may not be clear cut – there will be a question whether there is a sufficient relationship between the particular disbursements and the challenged activity. That issue is no different than causation questions that arise in a myriad of contexts.

---

[6] We agree with the government (Pet. Br. 37) that the size of the expenditure is not the relevant consideration.

Requiring an expenditure that is fairly traceable to the conduct violative of the Establishment Clause enables taxpayers to seek redress in situations in which there is a definite link between the expenditure of government funds and religion. At the same time, this requirement precludes claims in which that connection is attenuated. In that situation, the government spending could not reasonably induce in a taxpayer the concern about compelled exaction of funds for religious purposes that was the focus of the Framers' attention.[7]

This existing standard screens out the situations imagined by the government in its parade of horribles. Thus, a taxpayer would not have standing to challenge the content of one particular speech, for example the State of the Union address, as an Establishment Clause violation because he would not be able to identify an expenditure fairly traceable to that conduct. Transportation costs or rental fees for a venue, even if identifiable, would be too attenuated from the challenged conduct – as the court of appeals observed in this case. Pet. App. 14a; cf. *Simon*, 426 U.S. at 41-42. The same analysis applies to meetings of government officials, or of foreign officials. There accordingly is no warrant for the Court to adopt the novel restrictions on taxpayer standing proposed by the government.[8]

---

[7] That is the explanation for the result in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), which involved a taxpayer challenge to a state law providing for the reading of the Old Testament in public schools at the opening of each day, an essentially regulatory statute. The Court cited the taxpayer's lack of a "direct and particular financial interest" in rejecting standing. *Id.* at 435.

[8] Where standing cannot be based on taxpayer status, individuals may suffer other types of injury sufficient to establish standing to assert an Establishment Clause claim. In *Van Orden* v. *Perry*, 545 U.S. 844, 125 S. Ct. 2854 (2005), for example, the Court reached the merits of the Establishment Clause issue based on the injury incurred by the plaintiff from encountering a Ten Commandments monument on visits to the state capitol grounds. *Id.* at 2858.

B. *Flast* And Its Progeny Recognize Taxpayer Standing To Challenge Discretionary Spending Decisions By The Executive Branch With Respect To Funds Appropriated By Congress.

The government first asserts that a taxpayer may maintain an Establishment Clause claim only when the claim targets a decision by Congress; taxpayers supposedly may not challenge on Establishment Clause grounds discretionary spending decisions by the executive branch. "Once an appropriations law, whether general or targeted, is passed by both Houses of Congress and signed into law by the President, implementation and execution of that law is Executive Branch action" (Pet. Br. 30) not subject to challenge by taxpayers under *Flast*, although the government gerrymanders an exemption to this principle if "there is [a] * * * congressional taxing and spending program under challenge" (*id.* at 32).

The government's suggested rule is directly contrary to this Court's decisions in *Flast* and *Kendrick*, finds no support in any decision of this Court, and is wholly inconsistent with the history of the Establishment Clause.

1. Flast *Itself Upheld Taxpayers' Standing To Challenge Discretionary Spending Decisions By The Executive Branch.*

Flast v. *Cohen* did not present a challenge to congressional action; rather, it involved a dispute over a discretionary decision by the executive branch regarding funds appropriated by Congress. As the *Flast* plaintiffs explained in their brief in this Court, the lawsuit "challeng[ed] the constitutionality * * * of certain expenditures made by the Department of Health, Education, and Welfare." Br. of Appellants, *Flast v. Cohen*, 392 U.S. 83 (1968) (No. 416), 1967 WL 113846, at *3 (hereinafter "*Flast* Appellants' Br.").

The case involved two programs under the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79

Stat. 27. Title I of the Act authorized financial assistance to local educational agencies for the education of low-income families, whereby federal funds were paid to state agencies, which, in turn, passed them along to local agencies. Title II of the Act authorized federal grants to states for the purchase of library resources, textbooks, and other instructional materials for elementary and secondary schools. The complaint alleged that grants of federal funds under these titles to the New York City Board of Education were being used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." *Flast*, 392 U.S. at 87 (quoting the plaintiffs' complaint).

In their brief in this Court, the plaintiffs emphasized the limited nature of their claim:

> The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965. Paragraph 9 of the complaint states expressly that "There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local education agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution."

Flast Appellants' Br. at *4 (quoting plaintiffs' complaint). The government agreed. Br. of Appellee, *Flast v. Cohen*, 392 U.S. 83 (1968) (No. 416), 1968 WL 129299, at *13 (hereinafter "*Flast* Appellees' Br.") ("[t]he decision as to the details of how federal funds will be used – whether for programs in public facilities or in religious or sectarian facilities, for instance – is in no way controlled by the Act").

Thus, the claim before this Court was that executive branch officials had violated the Establishment Clause by ap-

proving the grants in question. The plaintiffs sought an injunction barring further approvals of such grants. *Flast* Appellants' Br. at 3.[9]

The facts of *Flast* thus demonstrate that the government is simply wrong in asserting that "[u]nder *Flast*, it is only when the congressional spending decision itself causes the alleged injury that the unique historic concern about Congress's abuse of its taxing and spending power to compel religious subsidization is implicated." Pet. Br. 27. The "congressional spending decision itself" did not cause any injury at all to the plaintiffs; the claim was based solely on the federal agency's discretionary decisions regarding the funds appropriated by Congress.[10]

---

[9] The government recognized that the complaint alleged that federal officials had approved grants for programs in religious schools (*Flast* Appellees' Br. at *11 & n.4), but informed the Court that "*neither the appellees nor any other federal official participate*" in the decision regarding how Title I grants will be used (*id.* at 13 (emphasis in original)). Rather, "this decision is made by the local educational agency, it is not even reviewed by appellees or any other federal officer * * *. There is no project-by-project approval at the federal level" because the federal funds were awarded to the State, which then disbursed them to local educational agencies. *Ibid.* The government informed the Court that "[t]he situation with respect to Title II * * * appears to be the same." *Id.* at 19.

The Court rejected the argument that these facts precluded the plaintiffs' claim, concluding that in light of the executive branch officials' "broad powers of supervision over state participation" and the fact that "it is federal funds administered by [those officials] that finance the local programs" the Court could not "characterize such federal participation as 'remote.'" 392 U.S. at 90 n.3. That determination further supports the conclusion that *Flast* upheld standing to challenge executive officials' discretionary decisions, not congressional actions.

[10] The government argues (Pet. Br. 21) that the Court's holding that a three-judge court was properly convened in *Flast* shows that the plaintiffs' claim challenged the constitutionality of the statute

2. Kendrick *Rejected The Precise Argument Advanced By The Government Here.*

This Court's decision in *Bowen* v. *Kendrick* erases any doubt that a taxpayer may challenge the discretionary decisions of executive branch officials concerning funds appropriated by Congress. The case involved the Adolescent Family Life Act ("AFLA"), 95 Stat. 578, 42 U.S.C. § 300z *et seq.*, a program for providing grants to nonprofit and publicly funded organizations to provide services relating to adolescent sexuality and pregnancy. The Court rejected the taxpayers' claim that the statute on its face violated the Establishment Clause because it authorized grants to religious organizations. See 487 U.S. at 601-18.

The plaintiffs also asserted an as-applied challenge, contending that particular grants awarded to religious organizations by the Secretary of Health and Human Services violated the Establishment Clause. The government, in turn, raised precisely the same standing objection presented here. It contended that the *Kendrick* plaintiffs lacked "standing as federal taxpayers to challenge the statute as applied," reasoning as follows:

> Under this Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), appellees' as-applied challenge fails because it is not "'made to an exercise by Congress of its power un-

---

and not the Executive Branch's administrative decisions. What the Court held was that the convening of the three-judge court was proper because *the complaint* included a challenge to the constitutionality of statute as an alternative claim to its challenge to the federal officials' decisions, allowing the plaintiffs to present both claims to the three-judge court. See 392 U.S. at 90-91. By the time the case reached this Court, however, that claim had been abandoned, as the plaintiffs themselves expressly stated in their brief in this Court. See page 23, *supra*.

> der Art. I, § 8, to spend for the general welfare'" (454 U.S. at 479, quoting *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968)), but rather is made to decisions by the Secretary about how to spend appropriated funds. Just as the plaintiffs in *Valley Forge* lacked standing to challenge a "decision by HEW to transfer a parcel of federal property" (454 U.S. at 479 (footnote omitted)), so, too, do appellees lack standing to challenge the individual spending decision made by the Secretary in implementing the AFLA.

Br. of Appellant, *Bowen* v. *Kendrick*, 487 U.S. 605 (1988) (No. 87-253) 1988 WL 1031759, at *n.24.

The Court unanimously rejected this argument. 487 U.S. at 619-20; *id.* at 630 n.4 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ., dissenting) (agreeing with majority on taxpayer standing issue). Speaking through Chief Justice Rehnquist, the Court stated: "We do not think * * * that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." 487 U.S. at 619.

The Court observed: "*Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created. In subsequent cases, most notably *Tilton*, we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, *even when their claims raised questions about the administratively made grants*." *Ibid.* (emphasis added; citations omitted).[11]

---

[11] The government points out (Pet. Br. 32) that "[t]he explicit decision to permit funds to be disbursed to religious groups was Congress's, not the Executive's," apparently intimating that this somehow is relevant to the standing issue. But this Court determined that Congress's directives did *not* violate the Establishment

In finding "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute" (487 U.S. at 620), the Court decisively rejected the government's view that only challenges to congressional action are cognizable under *Flast*. Indeed, the *Kendrick* Court made clear that taxpayers may challenge administrative decisions regarding the spending of funds appropriated by Congress even though such a claim does not call into question any decision made by Congress.[12]

3. *The Discretion Exercised By The Executive Branch With Respect To Spending Decisions Not Tied To A Congressional Program Is Indistinguishable From The Discretion Involved In The Challenged Decisions In* Flast *And* Kendrick.

The government asserts that the critical element in *Flast* and *Kendrick* was that "the agency disbursed funds at *Congress's* behest pursuant to a *congressional* taxing and spending program" (Pet. Br. 31 (emphasis in original)) and thus

---

Clause, yet it found that taxpayers still could raise challenges to the disbursement decisions of agency officials. The statutory language to which the government points had nothing to do with the Court's standing decision. That is confirmed by the fact that the Court reached the same conclusion regarding standing in *Flast*, which involved a statute that did not contain any express authorization of grants to religious organizations. See pages 22-23, *supra*.

[12] This Court has reached the merits in other cases in which the decision challenged under the Establishment Clause was not made by a legislature. See, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (no facial challenge to federal statute, claim limited to single grantee's use of funds awarded under the statutory program). And it rejected an argument similar to the one advanced in *Kendrick* in *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 380 n.5 (1985)

those cases are inapposite here. But nothing in the Court's analysis supports the assertion that simply because those cases happened to involve grant programs established by Congress the *Flast* rule is restricted to that setting. To the contrary, the limitation proposed by the government is wholly inconsistent with the Court's reasoning in those cases.

a. ***The government's test would preclude taxpayers from challenging a broad range of expenditures that inflict the precise injury that the Framers sought to prevent.***

From the taxpayer's point of view, it does not matter whether funds are disbursed pursuant to an express command of Congress, a congressionally designed grant program, a grant program designed entirely by an agency, a contract for services, or as salary payments to a government employee. In each situation, the expenditure of the funds in violation of the Establishment Clause produces precisely the same injury. The "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" (*DaimlerChrysler*, 126 S. Ct. at 1864 (citation omitted)) occurs whenever the government spends funds appropriated by Congress under Article I, section 8, regardless of which branch makes the decision that allegedly violates the Establishment Clause.

The government's position might make sense if the substantive restrictions imposed by the Establishment Clause applied only to Congress. But there is no doubt that the First Amendment applies fully to the activities of the executive branch. See, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) ("[t]he Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly").

Moreover, the breadth of the exclusion proposed by the government is staggering:

- If instead of the grants for textbooks at issue in *Flast*, the Department of Education purchased books using appropriated funds from a discretionary account and gave the books only to religious schools, taxpayers would not have standing to challenge that use of government funds.
- An agency could decide to use its discretionary funds to make bulk purchases of one particular religious symbol – Jewish stars, or crucifixes, or depictions of the star and crescent – for use in its offices or for distribution to employees or to the general public. Because discretionary funds were used, taxpayers could not challenge the expenditure.
- An agency could establish a chaplain's office, hiring clergy of only one denomination whose job it would be to hold meetings around the country to spread their faith. As long as the positions were created administratively and funded out of discretionary funds – as were the Faith-Based Offices here – the government's theory would preclude taxpayer standing.
- Rather than sponsoring conferences to discuss the federal grant process, agencies could fund a series of conferences around the country featuring clergy from one denomination and expressly billed as an effort to attract adherents to that religion. As long as discretionary funds were used, taxpayers would not be able to challenge that program.
- The Department of Education could decide to use its discretionary funds to fund contracts for development of school curricula. One of the contracts could be for religious education curricula designed to convince children – or adults – to

join one particular faith. If Congress had enacted a curriculum development grant program, the government would acknowledge taxpayer standing to challenge the award of such a grant. But if the program were formulated by the Secretary and funded out of discretionary accounts – or the contract in question were awarded on a one-off basis and not as part of a program – no challenge would be permissible.

- An agency could decide to award a contract for cleaning services only to a contractor that hired employees who believe in a Supreme Being. Under the government's theory, the disbursements under such a contract could not be challenged under *Flast*.
- Or, as the court of appeals observed (Pet. App. 11a-12a), an agency could use its discretionary funds to finance construction of a house of worship for a particular faith and taxpayers would not be able to challenge the expenditure.

Given the large amounts of money included in discretionary accounts,[13] as well as the ability of agency heads to transfer amounts from other accounts, as was done here (see pages 5-6, *supra*), the government's exception would bar standing to challenge a quite substantial category of expenditures impos-

[13] "For fiscal year 1905, for example, Congress appropriated to the Department of Justice a specific line item of $3,000 for stationery. Legislative, Executive and Judicial Appropriations Act, 1905, ch. 716, 33 Stat. 85, 134 (Mar. 18, 1904). For fiscal year 2005, Congress appropriated to the Department of Justice a lump-sum appropriation of $124,100,000 for administrative expenses. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title I, 118 Stat. 2853 (Dec. 8, 2004)." GAO, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 6-5 n.2 (3d ed. Feb. 2006), *available at* http://www.gao.gov/special.pubs/d06382sp.pdf.

ing the very same injury described in *Flast*. This Court should reject such a radical change.

b. ***The existence of a congressional "program" is irrelevant to the taxpayer's substantive claim.***

The government's proposed narrowing of *Flast* makes no sense because there is no logical connection between its requirement of a congressional program and the nature of the claim that a taxpayer may assert. A *Flast* claim permits a taxpayer to challenge the disbursement of funds only under the Establishment Clause. *Flast*, 392 U.S. at 102-03 ("the taxpayer must show that the challenged enactment exceeds *specific constitutional limitations* imposed upon the exercise of the congressional taxing and spending power") (emphasis added). *Congressional* limitations on the expenditure of funds cannot be raised by the taxpayer. Requiring the existence of a congressional program is therefore a purely arbitrary limitation on taxpayer standing that has nothing to do with the substantive claims the taxpayer may assert.

c. ***The government's "program" test is standardless.***

The government's test – the existence of a "congressional program" – has no substantive content. The government makes no effort to define what is needed to establish a "program"? One congressional specification? Five? The fiscal year 2002 appropriation act for the Department of Health and Human Services included the following statement regarding funds for the Compassion Capital Fund grant program at issue in the district court: "a compassion capital fund to provide grants to charitable organizations to emulate model social service programs and to encourage research on the best practices of social service organizations." Pub. L. No. 107-116, 115 Stat. 2177, 2196. Is that enough to constitute a "program" (the government did not dispute respondents' standing to challenge a grant under this program on

the ground at issue here)? The government's proposed test is extremely unclear, in addition to bearing no relation whatever to the claim that the taxpayer asserts.

Moreover, the absence of specific statutory standards relating to a particular appropriation does not mean that Congress has imposed no restrictions upon the disbursement of those funds. There are numerous general statutes governing expenditure of those funds that restrict the discretion of the agency in question.[14] If Congress has not enacted specific limitations applicable to a particular appropriation, it necessarily has determined that the funds may be expended at the discretion of the relevant official subject to these generally-applicable rules. That action by Congress should be sufficient to satisfy the government's standard.

d. **Flast *requires a congressional appropriation, not a congressional program.***

The government at one point asserts that respondents "do not challenge any specific congressional action or appropriation, and respondents do not ask the Court to invalidate any Act of Congress, on its face or as applied" (Pet. Br. 25). Respondents certainly do challenge specific congressional appropriations. The Amended Complaint singles out the "Congressional budget appropriations, made pursuant to Article I, section 8" (Pet. App. 73a (¶ 32) & 76a (¶ 36)) as well as disbursement decisions regarding those appropriations (*id.* at 77a (¶ 41)).

Certainly there is no requirement that a taxpayer assert a facial challenge to a federal statute in order to maintain an Establishment Clause claim. There was no such claim before

---

[14] See, *e.g.*, GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS, at 3-44 (3d ed. 2004) ("federal laws of general applicability" remain applicable to disbursements from discretionary accounts unless Congress expressly directs otherwise), *available at* http://www.gao.gov/special.pubs/d04261sp.pdf.

this Court in *Flast*, and this Court in *Kendrick* permitted the as-applied challenges to proceed notwithstanding its rejection of the facial challenge to the AFLA's constitutionality.

To the extent *Flast* requires the taxpayer to identify the particular statute that is challenged, such a requirement logically would focus on the relevant appropriations statute, because that is the law enacted pursuant to Article I, section 8 that permits the spending that is the source of the taxpayer's injury. The *Flast* Court adverted to the appropriations statute. 392 U.S. at 103 n.23. And those are the laws that respondents identified here.[15]

Indeed, the language in *Flast* on which the government relies – referring to "the type of legislative enactment attacked" and the requirement that the taxpayer show "that the challenged enactment" exceeds limitations on "the exercise of the congressional taxing and spending power" (Pet. Br. 31a) – could only mean the appropriations law, because the plaintiffs in *Flast* did not challenge the constitutionality of the authorizing statute (the Elementary and Secondary Education Act) before this Court. See page 23, *supra*. By requiring a taxpayer to "show that *the challenged enactment*

[15] Contrary to the government's assertion (Pet. Br. 30), this does not render the requirement meaningless – it ensures that the injury identified by the taxpayer indeed flows from the spending of taxpayer funds. Some government functions are self-funding, based on fees or other receipts. The classic example, of course, is the Postal Service – which, with the exception of franked mail and similar special circumstances, see, *e.g.*, 39 U.S.C. § 2401(b)-(d), must be supported entirely by fees received for postal services. See 39 U.S.C. §§ 2401(a), 3621; see also United States Postal Service, 2005 ANNUAL REPORT, at 30, *available at* www.usps.com/history/anrpt05/usps_ar05.pdf ("[a]s an independent establishment of the executive branch of the United States government, we receive no tax dollars for our operations. We are self supporting, and have not received a public service appropriation since 1982")

exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power" and noting that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the *taxing and spending power conferred by Art. I, § 8*" (392 U.S. at 102-03, 104 (emphasis added)), the Court made clear that the appropriations statute was the statute to which it referred.

The government's attempt to limit *Flast* to expenditures pursuant to a "program" established by Congress is thus directly contrary to the rationale of *Flast*, as explained just last Term in *DaimlerChrysler*; is wholly illogical and unclear; and is inconsistent with the language and analysis that the Court employed in *Flast*. This Court should reject this unjustified argument, as it did when the defendants presented the very same contention in *Kendrick*.[16]

---

[16] The government asserts (Pet. Br. 30) that "Congress's taxing and spending power is not self-perpetuating after an appropriation is made," but rather "ends when the funds are appropriated – that is, when the funds are delivered into the control of the Executive Branch." That contention proves too much. If it were true, statutory restrictions on the disbursement of appropriated funds – whether contained in the appropriations act or in other laws enacted by Congress – would be inapplicable as soon as an appropriations act is signed by the President. Surely that is not the government's position. An appropriation is "[a]n authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." *Andrus* v. *Sierra Club*, 442 U.S. 347, 361 n.18 (1979) (quoting Comptroller General of the United States, TERMS USED IN THE BUDGETARY PROCESS 4 (1977)).

4. *The Other Decisions Relied Upon By The Government Provide No Support For Prohibiting Taxpayer Challenges To Discretionary Spending Decisions By The Executive Branch.*

The government cannot identify a single case in which this Court held that a taxpayer could not assert an Establishment Clause claim because the suit challenged a decision by the executive branch – and not by Congress – regarding the disbursement of appropriated funds. Much of the government's arguments consists of selected quotations from – and references to – three cases: *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Neither the holdings nor the rationales of these decisions support the government's proposed rule. None denied standing based on the absence of a spending "program" enacted by Congress; each held that the plaintiffs lacked standing as taxpayers because their claimed injury bore no relation to their status as taxpayers.

Richardson involved a taxpayer's claim that the accounting procedures employed by the Central Intelligence Agency violated Article I, section 9, clause 7 of the Constitution, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The plaintiff's alleged injury was his inability to "obtain a document that sets out the expenditures and receipts" of the CIA. 418 U.S. at 169.

This Court concluded that the plaintiff's claim was "not addressed to the taxing or spending power, but to the statutes regulating the CIA." *Id.* at 175. Although the suit was a challenge to congressional action pursuant to Article I, it made "no claim that appropriated funds [were] being spent in violation of a 'specific constitutional limitation upon the * * * taxing and spending power.'" *Ibid.* (omission in original) (quoting *Flast*, 392 U.S. at 104). Because the challenged

conduct was not the expenditure of appropriated funds – but rather the failure to provide reports – the taxpayer failed to establish the required "'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency." *Ibid.*

The complaint in *Schlesinger* asserted that the Incompatibility Clause of Article I, section 6 of the Constitution barred members of Congress from holding a commission in the Armed Forces during their tenure in office. The plaintiffs alleged that these Members were subject to "inconsistent obligations" and "undue influence by the Executive Branch," which deprived the plaintiffs "'of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled.'" 418 U.S. at 212 (quoting plaintiffs' complaint).

The government argued in that case that "[b]y no stretch of the imagination can the situation complained of, the presence of congressmen in the reserves, be called congressional action under the taxing and spending clause." Br. of Petitioners, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (No. 72-1188), 1973 WL 183884, at *23. This Court agreed, rejecting standing because the plaintiffs' injury did not stem from the disbursement of federal funds and therefore bore no "logical nexus" to plaintiffs' status as taxpayers. 418 U.S. at 227-28.[17]

The plaintiffs in *Valley Forge* alleged that a transfer of property by the Secretary of Health, Education, and Welfare

[17] The Court noted that the plaintiffs sought an order compelling the government to seek the return of pay received by the Members of Congress who also were reservists. 418 U.S. at 228 n.17. But that relief was sought as a consequence of prevailing on the merits; it was not the injury for which the plaintiffs sought redress. *Id.* at 212 (discussing injury claimed by the plaintiffs).

to a religious college violated the Establishment Clause. The Court held that that plaintiffs failed to demonstrate the nexus required by *Flast* because the property transfer "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8." 454 U.S. at 480. The problem, as the Court saw it, was that "[t]he authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2." *Ibid.* This undisputed fact "[was] decisive of any claim of taxpayer standing under the *Flast* precedent." *Ibid.*; see Br. of Petitioners, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (No. 80-327), 1981 WL 390380, at *10 (government arguing that the fatal flaw in the plaintiffs' assertion of taxpayer standing was that "unlike *Flast*, the complained of activity finds its constitutional genesis in the Property Clause").

The Court also stated that "the source of [the plaintiffs'] complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property" (454 U.S. at 479), and the government asserts (Pet. Br. 28) that this observation supports its requirement of a congressional "program." That is the precise argument that this Court rejected unanimously in *Kendrick*, explaining that the plaintiffs' claim was not "any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." 487 U.S. at 619.

The government also argues that the claim in *Valley Forge* could have been reframed as a challenge to the expenditure of appropriated funds: the "federal funds [that] paid the salaries of federal officials while they processed applications for property." Pet. Br. 27. But such a claim would have failed because such expenditures would not have been

"fairly traceable" to the challenged conduct and therefore could not support taxpayer standing under *Flast*.[18]

The absence of any authority from this Court that supports the government's proposed restriction confirms that the restriction should be rejected.

5. *The History Of The Establishment Clause Demonstrates That Its Framers' Concerns Encompassed All Government Spending In Support Of Religion.*

The Court in *Flast* relied heavily on the Establishment Clause's history in concluding that taxpayers suffer a judicially cognizable injury from expenditures of federal funds violative of the Clause. The "specific evil" feared by the Framers "was that the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. "The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04.

Seizing upon the statement in the next sentence of the *Flast* opinion that the Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, 8" (*id.* at 104), the government contends that the Framers' concern was limited to "legislatively directed grants in aid of religion" (Pet. Br. 19). Nothing in the relevant history supports that assertion.

To begin with, *Flast*'s reference to "the exercise by Congress of the taxing and spending power" does not mean that standing exists only if the disbursement decision viola-

[18] The government's characterization of *Doremus* (Pet. Br. 29) is wrong for the same reason. The defect there was not the absence of a "separate tax" or "particular appropriation"; it was the absence of a separate *expenditure* that was not incidental to an essentially regulatory statute. 342 U.S. at 434.

tive of the Establishment Clause was made by Congress. As we have discussed, that was not true in *Flast* itself. See pages 22-24, *supra*. Rather, the statement reinforces *Flast*'s requirement that the taxpayer's challenge must be directed to an expenditure of federal funds *authorized by Congress pursuant to its spending power*, as opposed to an enactment pursuant to another of Congress's legislative powers, because the substantive limitation applies to the spending power. See pages 28-31, *supra*. And the *Flast* Court itself recognized that the Framers' concern was use of "government" – not "congressional" – powers (392 U.S. at 105-06) to expend in support of religion funds exacted pursuant to the taxing power.

The government points to nothing in the historical record supporting its claim that congressional decisions were the sole concern of the Framers of the Establishment Clause. And any such argument would be undercut by this Court's decisions making clear that the Establishment Clause applies to the executive branch as well as to Congress.

Given their knowledge of English history, moreover, the Framers were well aware of the potential for abuse of executive power, especially in the area of religion.[19] The history of the monarchy was replete with examples of establishment of particular denominations.[20] Some of these situations involved coerced payments of funds that then were used by the monarch to aid a particular religion. It is impossible to be-

[19] See, *e.g.*, Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1419-20 (2004); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1141 (2004).

[20] The monarch established and maintained substantial influence on the Church of England. See Esbeck, *supra* note 24, at 1404-05. For example, the monarch had the final say on doctrinal issues and was vested with the authority to select bishops. See 1 William Blackstone, COMMENTARIES *269, *365-69.

lieve that individuals knowledgeable about this history would have had *fewer* concerns about establishments of religion by the executive branch.

Thomas Jefferson certainly understood the Clause to limit executive authority. Describing the Clause's effect on the executive branch, he stated that "civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* THOMAS JEFFERSON: WRITINGS 1186-87 (Merrill D. Peterson ed., 1994). Also relevant is the bill that Jefferson drafted, and the Virginia Legislature enacted, in place of the measure to support religious teachers that was the target of Madison's Remonstrance: Jefferson's bill, which guaranteed religious freedom, targeted in its preamble "the impious presumption of legislators *and rulers*, civil as well as ecclesiastical, who * * * hath established and maintained false religions over the greatest part of the world." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 PAPERS OF THOMAS JEFFERSON 305 (Julian P. Boyd et al. eds., 1950) (emphasis added). In Jefferson's view, "the *government* of the United States [is] interdicted by the Constitution from intermeddling with religious institutions. * * * Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government." Letter from Thomas Jefferson to Rev. Samuel Miller, *supra* (emphasis added).

President Madison shared Jefferson's view that, as chief executive, he was bound to discharge his duties in a manner consistent with the Establishment Clause. In 1811, Madison returned to the House of Representatives a bill that had been passed by both houses of Congress and transmitted for his signature, entitled, "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia." 5 THE FOUNDERS' CONSTITUTION 99 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison sent a state-

ment indicating that he declined to sign the bill because it "exceeds the rightful authority to which *Governments* are limited, by the essential distinction between civil and religious functions," and specifically, that it violated the Establishment Clause. *Ibid.* (emphasis added).

To the extent the Framers' statements focus on abuses by Congress, it is because they viewed the executive as by far the weaker branch. Thus, Madison stated that "in our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other, because it is not the stronger branch of the system, but the weaker," although he made clear that the prohibitions of the Clause extended to both. 1 ANNALS OF CONGRESS, 454 (Joseph Gales ed., 1789).

The Framers' focus on Congress is especially understandable in the area of spending. The Constitution gave Congress the "power of the purse," which Madison described as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58, at 359 (Rossiter ed., 1961). In fact, Madison viewed the vesting of the appropriation power in Congress as "the great bulwark which our Constitution had carefully and jealously established against Executive usurpations." 3 ANNALS OF CONGRESS 938 (1793).

Early appropriations laws left no room for the exercise of executive discretion. Thus, a bill passed on March 14, 1794, appropriated one thousand two hundred dollars "[f]or wood and candles in the several offices of the treasury department (except the Treasurer's office)," and two thousand dollars "[f]or the expenses of stationery, printing and other contingent expenses" in the office of the Register of the Treasury. 3 Cong. Ch. 6, 1 Stat. 342 (1794). That same bill provided simply "[f]or the compensations granted by law to

the President and Vice President of the United States, thirty thousand dollars." *Ibid.*

The Framers simply could not have anticipated an appropriations bill allocating $53,830,000 "to be available for allocation within the Executive Office of the President" (Pub. L. No. 109-115, 119 Stat. 2396, 2472 (2005)) and leaving entirely to the President the decisions about disbursing the funds, subject to limits imposed by generally-applicable laws. They believed such decisions would fall solely within the province of Congress.

For the Framers, therefore, to express concern about Congress's decisions regarding disbursement of federal funds was to express that concern about *all* such disbursement decisions, because the Framers did not believe that any discretionary decisions would be made by the executive branch. Now that the executive branch is exercising some of the discretion previously confined to Congress, the only interpretation faithful to the original meaning of these statements – to capture all discretionary disbursement decisions – is to treat discretionary decisions by the executive branch in the same manner as discretionary decisions by Congress: as a basis for taxpayer standing as long as other applicable requirements are satisfied.

C. Taxpayers' Standing To Assert Establishment Clause Challenges Is Not Restricted To Grants Of Government Funds To Third Parties.

The government also suggests that this Court adopt a new rule allowing taxpayers to challenge *only* disbursements to third parties. Pet. Br. 44. All other expenditures of appropriated funds would be immune from challenge by taxpayers under the Establishment Clause.

There simply is no basis for limiting taxpayer standing to grants to third parties. Other expenditures of government funds impose the very same injury – the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" (*Daimler-*

Chrysler, 126 S. Ct. at 1865) – and have been held to support taxpayer standing. Thus, this Court has recognized that the expenditure of government funds for a chaplain's salary gives rise to taxpayer standing to challenge that disbursement as a violation of the Establishment Clause. *Marsh* v. *Chambers*, 463 U.S. 783, 786 n.4 (1983); see also *Katcoff* v. Marsh, 755 F.2d 223 (2d Cir. 1985) (military chaplain). Most of the examples above that discuss discretionary expenditures (at 21) do not involve grants to religious organizations and would therefore be excluded under the government's rule even though they impose the precise injury targeted in *Flast*.[21]

As with the government's proposed congressional "program" requirement, moreover, this restriction bears no relationship to the principle underlying *Flast*. Indeed, the government's approach turns the concept of injury identified in *Flast* on its head, prohibiting standing to challenge direct expenditures by government supporting religion, while permitting standing to challenge expenditures of government funds that are filtered through third parties. Plainly the direct expenditures are an equal – or even greater – intrusion on the values protected by the Establishment Clause.

The government relies on history to argue that the sole concern of the Framers of the Establishment Clause was "the provision of funds to churches or other institutions outside the government to subsidize their own religious exercise" (Pet. Br. 39). That contention is plainly wrong.

The government's entire argument is based on a false choice: between a view of the motivating purpose of the Establishment Clause as preventing government officials from "speak[ing] favorably about religion or [from] * * * meet[ing] with representatives of religious groups" (Pet. Br. 39), or as "the fear that Congress would use its power forci-

[21] The Court in *Marsh* observed that the plaintiff also had standing as a legislator. 463 U.S. at 786 n.4.

bly to transfer funds from taxpayers into the coffers of churches or other institutions" external to the government that then would be used for religious activities (*id.* at 41). Respondents do not espouse the government's straw man position – that the motivating purpose of the Clause was to limit officials' statements about religion. The government's discussion (Pet. Br. 39-41) of the Framers' religious beliefs and the invocation of God in proclamations and speeches is therefore wholly irrelevant.

The real question before the Court is whether the Framers were concerned generally about the use for religious purposes of funds exacted from taxpayers; or whether their concern was limited to grants to churches and other non-governmental institutions, leaving the government free to use taxpayer funds itself to establish religion.

None of the government's historical evidence supports its assertion that Framers' concern was limited to grants to churches. References to paying ministers' salaries, or building and maintaining churches, or maintaining a particular religion (Pet. Br. 41 nn. 14 & 15) do not help the government, because each of these goals can be accomplished by direct government expenditures as well as by grants to outside entities. Thus, the executive could itself build a church and make the facility available to a chosen religion; the government could put clergy of a particular denomination on its payroll.

Moreover, the Framers were well aware of the dangers that could result from linkage between the executive branch and religion. They were quite familiar with the Church of England, headed by the King. Since the Framers knew that Church and State could literally be commingled, and did not indicate any intent to exclude that situation from the Clause's reach – indeed, it was one of the principal reasons for the Clause – the only possible conclusion is that the Framers intended to reach all expenditures of taxpayer funds that violate the Clause's prohibition. See also pages 39-42, *supra*.

Nothing in the materials cited by the government provides the slightest hint that some government actions were exempt from the Framers' concern about use of public funds. Under the government's theory, Madison would have withdrawn his Remonstrance – and had no objection to the Virginia statute providing funds for the hiring of religion teachers – if only the statute had been drafted to make the teachers state employees rather than employees of the church. In fact, of course, it was the use of the government funds to which Madison objected, not the particulars of the employment relationship. There simply is no basis for prohibiting taxpayers from challenging such core violations, violations that impose the precisely same injury – "forc[ing] a citizen to contribute * * * for the support of any one establishment" – as a grant of funds to a church for religious purposes. *DaimlerChrysler*, 126 S. Ct. at 1864.

Finally, the government's approach would elevate form over substance, and allow the government to preclude taxpayer claims by internalizing activities that support religion. The example discussed earlier with respect to grants for curricula development discussed above (see pages 29-30, *supra*) shows how. If the Department of Education issued a grant or contract to a third party for development of the curricula, the government's proposed rule would permit a taxpayer challenge. But if the Department instead gave the task to a newly established office for religious curricula development and hired employees especially for that office, taxpayer standing would be barred. That distinction makes no sense.[22]

---

[22] The government also cites (Pet. Br. 18-19) Justice O'Connor's concurring opinion in *Mitchell* v. *Helms* as support for its focus on grants to third parties. But just after the passage quoted by the government, Justice O'Connor cited the following statement from the Court's decision in *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970): "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign

D. The Government's Proposed Restrictions Are Not Justified By General Standing Principles Or Separation Of Powers Concerns.

Underlying the government's two proposed restrictions are its repeated assertions that further limitations on the *Flast* principle are necessary to ensure conformity with general standing doctrine and to prevent intrusion on separation of powers interests. Of course, these assertions ignore the existing limits on taxpayer standing, and the fact that those standards already address these concerns. See pages 19-21, *supra*. Further restrictions are not necessary.

1. Flast *Is Entirely Consistent With General Standing Principles.*

This Court in *DaimlerChrysler* explained that *Flast* is fully compatible with general standing principles:

> The *Flast* Court discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.' The Court therefore understood the 'injury' alleged in the Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.

126 S. Ct. at 1865 (citations omitted).

Existing standards (see pages 19-21, *supra*) ensure that the taxpayer has suffered the sort of injury required by *Flast*.

---

in religious activity." That statement makes clear that the Framers' concern went far beyond grants to churches, and included other means of expending federal funds to provide support to religion.

Accordingly, the Government is wrong in suggesting that *Flast* must be narrowed dramatically, with radical new restrictions that are wholly inconsistent with the Framers' concerns and this Court's rationale, in order to ensure the existence of an injury sufficient to satisfy Article III.[23]

2. *Existing Principles Governing Taxpayer Standing Prevent Intrusion On Legitimate Separation of Powers Interests.*

The government's invocation of separation of powers principles is also inapposite. Conventional standing principles screen out the insubstantial claims that the government fears. They also ensure that taxpayer standing will only be available for the type of injury that was the focus of the Framers' attention. See pages 19-21, *supra*.

The government's concerns that taxpayer claims might force federal courts to adjudicate constitutional claims by plaintiffs without sufficient actual injury are therefore misplaced. Similarly, courts will not be flooded with claims challenging "every governmental encounter with religion" (Pet. Br. 47). Speeches and meetings of executive branch

---

[23] Amici urge the Court to overrule *Flast* as inconsistent with Article III's injury-in-fact requirement. See Br. of States of Indiana *et al.* at 14-25; Br. of Foundation for Moral Law at 14-20. In *Flast*, the Court expressly and directly rejected the argument amici now seek to revive, that a taxpayer's assertion of an Establishment Clause injury constitutes "no more than the mere disagreement by the taxpayer with the uses to which tax money is put." 392 U.S. at 98 (citation and internal quotation marks omitted). *Flast* has been applied to uphold standing in nearly a dozen cases in this Court (see pages 16-17, *supra*) and numerous cases in the lower courts. And this Court just reaffirmed this understanding of *Flast* in *DaimlerChrysler*. There simply is no basis for the dramatic step urged by amici.

personnel by themselves simply do not satisfy the applicable standing requirement.[24]

Finally, clearly explaining the rationale underlying *Flast*, reaffirming the existing limits on taxpayer standing, and applying those limits to the facts of this case will provide lower courts with clear guidance for addressing claims of taxpayer standing. Indeed, it is adoption of the government's unprecedented restrictions on standing that would create confusion in an area in which the lower courts have been fairly successful in separating legitimate and illegitimate claims. See page 18 & note 5, *supra*.

E. The Amended Complaint Alleges Facts Sufficient To Establish Respondents' Standing As Taxpayers To Challenge The Expenditures At Issue In This Action.

Here, the alleged violation of the Establishment Clause is petitioners' program of conferences, which respondents allege are designed to give religious organizations a preference in the grant process. See pages 6-7, *supra*. Those allegations are plainly sufficient to establish respondents' standing to sue

---

[24] Many States have taxpayer standing rules broader than *Flast* – and with respect to unlawful acts generally. See, *e.g.*, *Williams* v. *Lara*, 52 S.W.3d 171, 179 (Tex. 2000) ("Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury."); *Louisiana Associated Gen. Contractors, Inc.* v. *Calcasieu Parish Sch. Bd.*, 586 So. 2d 1354, 1358 (1991); *Danzl* v. *City of Bismarck*, 451 N.W.2d 127, 129 (N.D. 1990); *Washington ex rel. Boyles* v. *Whatcom County Superior Court*, 694 P.2d 27, 30 (Wash. 1985); *Zeigler* v. *Baker*, 344 So. 2d 761, 763-64 (Ala. 1977); *Kirk* v. *Clark*, 4 S.E.2d 13, 15 (S.C. 1939). In these States, which include some of the amici in this case, a flood of lawsuits has not occurred and state government has neither ground to a halt nor been dominated by judicial decisions. That experience, combined with the existing, much more stringent limitations in this Court's jurisprudence, provides strong evidence that the government's fears are unjustified.

as taxpayers. Indeed, if Congress had authorized the FBCI Office conferences by incorporating the provisions of the executive orders into a statute, and a taxpayer challenged the expenditures for that program on the ground that it granted a preference to religious organizations, standing would be clear. The result should be no different simply because the program was instead created by executive order.

The challenged expenditures plainly are traceable to the alleged unconstitutional conduct. Respondents challenge the entire program. As the court of appeals concluded, "since the program itself is challenged as unconstitutional" (Pet. App. 16a) respondents have shown the requisite link between their injury and the challenged conduct. Because respondents' claim satisfies the standard that this Court has established for taxpayer claims under the Establishment Clause, respondents have standing to pursue this action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GIOVANNA SHAY
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
CHARLES A. ROTHFELD
ELIZABETH G. OYER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

RICHARD L. BOLTON
Counsel of Record
Boardman, Suhr, Curry & Field LLC
One South Pinckney Street
Madison, WI 53703
(608) 257-9521

Counsel for Respondents

FEBRUARY 2007

SUPREME COURT, U.S.
FILED
FEB 13 2007
OFFICE OF THE CLERK

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. *Flast* is carefully limited to challenges to Congress's exercise of its taxing and spending power 2
   1. History and precedent require a challenge to congressional power 2
   2. Respondents do not challenge the constitutionality of federal law as applied 7
      a. Precedent 7
      b. Established usage 10
      c. Constitutional limits 11

B. *Flast* is limited to challenging congressionally directed disbursements of funds outside the government 16

TABLE OF AUTHORITIES

Cases:

American United for Separation of Church & State, Inc. v. *Department of Health, Educ. & Welfare*, 619 F.2d 252 (3d Cir. 1980), rev'd by, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 9

Bowen v. *Kendrick*, 487 U.S. 589 (1988) ..... *passim*

Cincinnati Soap Co. v. *United States*, 301 U.S. 308 (1937) 16

Clinton v. *City of New York*, 524 U.S. 417 (1998) 16

DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) ..... *passim*

Doremus v. *Board of Educ.*, 342 U.S. 429 (1952) ..... *passim*

Cases—Continued: Page

Everson v. *Board of Educ.*, 330 U.S. 1 (1947) 18
Flast v. *Cohen*, 392 U.S. 83 (1968) ..... *passim*
Frothingham v. *Mellon*, 262 U.S. 447 (1923) 14
Gonzales v. *Raich*, 545 U.S. 1 (2005) 10
Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) .. 10
Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. *United States*, 136 U.S. 1 (1890) 8
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 13
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13
Northeastern Fla. Ch. of the Associated Gen. Contractors v. *City of Jacksonville*, 508 U.S. 656 (1993) 15
OPM v. *Richmond*, 496 U.S. 414 (1990) 16
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 2, 3, 12
School District of Abington Township v. *Schempp*, 374 U.S. 203 (1963) 10
Tenneessee v. *Lane*, 541 U.S. 509 (2004) 10
United States v. *Richardson*, 418 U.S. 166 (1974) 2, 3
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) ..... *passim*

Constitution, statutes, and regulations:

U.S. Const.:
Art. I, § 9, Cl. 7 16
Art. III ..... *passim*
Amend. I (Establishment Clause) ..... *passim*
42 U.S.C. 2000bb *et seq.* 15

Statute and regulations—Continued:

42 U.S.C. 2000e *et seq.* 15
34 C.F.R. (1980):
Section 12.5 8
Section 12.9(a) 8

Miscellaneous:

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Pt. 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 8, 18

Respondents' brief reads as if taxpayer standing is the rule under our Constitution, not a narrow exception. But the "general rule" is that taxpayers *lack* standing to challenge government action, no matter how unconstitutional they may allege it to be. *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988). That principle is firmly grounded in Article III and the separation of powers. See *Daimler-Chrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1860-1864 (2006). In *Flast* v. *Cohen*, 392 U.S. 83 (1968), the Court recognized a narrow exception to that rule for a limited subset of Establishment Clause challenges. In so doing, the Court specifically declined the suggestion of Justice Douglas to allow all taxpayer suits, see *id.* at 107-114, and of Justice Fortas to allow taxpayer suits for all Establishment Clause claims, *id.* at 115-116. Instead, this Court in *Flast* and in the four decades since has carefully confined taxpayer standing to suits that meet two criteria. First, the suit must challenge "*only* * * * exercises of *congressional* power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102 (emphasis added). Second, the challenge must seek to vindicate the Establishment Clause's specific limitation on that congressional power. *Ibid.*; see *DaimlerChrysler*, 126 S. Ct. at 1864.

Respondents seek to discard both prongs and subsume the standing inquiry into a single question of traceability. But this Court has never conceptualized the *Flast* nexus requirements as a traceability standard. In any event, respondents clearly have something much grander than the mere reconception of existing limits in mind. Their effort to recast taxpayer standing doctrine as a traceability requirement appears designed to water down the requirements of *Flast* sufficiently to allow their suit to proceed. Their traceability test, however, offers nothing of substance to distinguish their current challenges from those they have apparently abandoned (such as their initial complaint alleging an Establishment Clause violation based on a single speech by the Education Secre-

tary) or from any other Executive Branch action financed by appropriations. Respondents prudently abandon even the Seventh Circuit's de minimis exception (Br. 20 n.6), but fail to explain why their traceability standard does not allow taxpayer standing to challenge each and every Executive Branch action alleged to violate the Establishment Clause.

Rather than replace something with nothing, this Court should reaffirm the limited nature of the *Flast* exception. *Flast* recognized a narrow exception for exercises of congressional taxing and spending authority that, by transferring government largesse to outside entities for religious use, could be conceived of as the functional equivalent of state-compelled tithes. Both this Court's precedent and the constitutional commands of Article III preclude any expansion of taxpayer standing beyond that specific context. And respondents, who allege that Executive officials are unlawfully participating in conferences and making speeches that are funded in the most indirect means through general appropriations, have not come close to satisfying *Flast*'s established elements, much less the requirements of Article III.

A. *Flast* Is Carefully Limited To Challenges To Congress's Exercise Of Its Taxing And Spending Power

1. History and Precedent Require a Challenge to Congressional Power

Five times this Court has addressed the elements of taxpayer standing under *Flast* and five times this Court has held that an indispensable element is a challenge to Congress's taxing and spending power.[1] That is the "only" type of suit permitted. *Valley Forge Christian Coll.* v. *Americans United*

---

[1] See *Kendrick*, 487 U.S. at 619-620; *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974); *United States* v. *Richardson*, 418 U.S. 166, 175 (1974); *Flast*, 392 U.S. at 102; see also *DaimlerChrysler*, 126 S. Ct. at 1864.

for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982); *Flast*, 392 U.S. at 102. Where, by contrast, responsibility for the allegedly unconstitutional conduct lies in the exercise of Executive Branch power, taxpayer standing has been denied. A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Valley Forge*, 454 U.S. at 479.[2] Indeed, this Court in *Valley Forge* was clear that the challenge there "[was] deficient in two respects:" not just that the only congressional authority at issue was the Property Clause, but also the simple fact that the target of their challenge was "not a congressional action," but an executive action. *Ibid.* Moreover, the Court has repeatedly rejected standing for challenges to executive actions, notwithstanding that all of the challenged Executive Branch activities necessarily entailed the use and expenditure of appropriated funds.[3]

The restriction of taxpayer standing to challenges to congressional taxing and spending is constitutionally compelled. Taxpayers generally lack Article III standing. See Pet. Br. 12-16. *Flast* found Article III satisfied only with respect to a "specific evil[] feared by those who drafted the Establishment Clause," which was that Congress's taxing and spending power would be used to "force a citizen to contribute three pence only of his property for the support of any one establishment." 392 U.S. at 103. Although other government action—congressional or executive—can violate the Establishment Clause, only congressional exercises of the taxing and

---

[2] See *Schlesinger*, 418 U.S. at 228 & n.17 (no taxpayer standing to challenge "the action of the Executive Branch" and the "invalidity of Executive action in paying" out taxpayer funds); *Richardson*, 418 U.S. at 175 (no standing where the challenge was "not addressed to the taxing or spending power," but to Executive Branch compliance with the law); see also *Doremus* v. *Board of Educ.*, 342 U.S. 429, 434 (1952).

[3] See *Valley Forge*, 454 U.S. at 466-467 & n.4; *Schlesinger*, 418 U.S. at 211, 228 & n.17; *Richardson*, 418 U.S. at 168-169 (seeking to enjoin publication of a governmental report and reporting procedures).

spending power to bestow government largesse on the religious activities of others can give rise to Article III standing for a taxpayer.

Under *Flast*, that particular form of congressional action provides a basis for taxpayer standing not because it is more serious or obvious than other alleged Establishment Clause violations. After all, it is clear that even a joint resolution declaring one denomination the national religion would not give rise to taxpayer standing. Rather, congressional taxing and spending alone can give rise to Article III standing for a taxpayer because that particular governmental action is analogous to a state-compelled tithe, which not only was a principal concern of the Framers, but also is a practice that has a distinct nexus to taxpayer status.[4] The Court in *Flast* accordingly held that only when a taxpayer seeks to vindicate, not the Establishment Clause writ large, but that "specific constitutional limitation[] imposed upon the exercise of the congressional taxing and spending power," 392 U.S. at 103, an Article III injury in fact arises, *id.* at 102-103.

Respondents' answer to that body of precedent demarcating the narrow, historic bounds of taxpayer standing is to deny its existence. First, respondents insist (Br. 22) that "*Flast* v. *Cohen* did not present a challenge to congressional action." This Court held the opposite. See 392 U.S. at 85 ("In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer *attacks a federal statute* on the ground that *it* violates the Establishment and Free Ex-

---

[4] If Congress enacted a tax for the specific purpose of funding religious entities, a taxpayer qua taxpayer would have standing to seek a refund. *Flast* extends taxpayer standing to the situation where the congressional decision to tax and the congressional decision to fund third-party religious recipients are separated and the prospect of a refund remote. Even that extension has been subject to criticism, see, *e.g.*, 392 U.S. at 116-133 (Harlan, J., dissenting); U.S. Br. 49 n.17, but any further expansion of *Flast* would untether it from the irreducible minimum requirements of Article III standing.

ercise Clauses of the First Amendment.") (emphasis added).[5] While the Court noted that the complaint also included a "nonconstitutional ground for relief"—a statutory argument that federal officials' authorization of payments "are in excess of their authority under the Act"—the Court expressly rested its jurisdiction (and that of the three-judge court below) on the inclusion of an "alternative and constitutional ground for relief, namely, a declaration that * * * the Act is to that extent unconstitutional and void." *Id.* at 90.[6]

Second, respondents argue (Br. 25-28) that *Bowen* v. *Kendrick* opened the door to taxpayer suits challenging discretionary Executive Branch activities. But *Kendrick* expressly "adhered to *Flast*" and reiterated that *Flast* standing is limited to Establishment Clause challenges to "exercises of congressional power under the taxing and spending power." 487 U.S. at 618. The Court also repeated that "a challenge to

---

[5] See also *Flast*, 392 U.S. at 86 ("Appellants' constitutional attack focused on the *statutory criteria* * * * for federal grants under the Act.") (emphasis added); *id.* at 87 (challenging that "federal funds have been disbursed *under the Act*") (emphasis added); *ibid.* (seeking a declaration that "the Act['s]" authorization of such disbursements "is to that extent unconstitutional and void"). Respondents' argument (Br. 33) that *Flast* concerned the constitutionality of Executive Branch appropriations, rather than the Elementary and Secondary Education Act of 1965, is baffling because the Court identified the statutory target of the taxpayers' challenge by name and framed the constitutional argument as a challenge to that "Act," not to some separate appropriation provision or legislation. 392 U.S. at 90.

[6] The Court did not understand the taxpayers to be arguing that the actions of the Executive Branch were themselves unconstitutional, because the Court described the alternative argument as couched solely in terms of statutory authority. *Flast*, 392 U.S. at 90. Respondents' reliance on select quotations from briefs overlooks that, when confronted with the government's challenge to jurisdiction, Flast was quick to confirm in her reply brief that "[i]t has been our position throughout the proceedings that * * * the statute is unconstitutional" to the extent that it authorizes disbursements to religious schools. Pet. Reply Br. 2 (No. 416); see also Pet. Reply to Mot. to Dismiss 2 (No. 416) ("[T]he plaintiffs agreed * * * that the only issue before the three-judge court would be the constitutionality of Title I and Title II" as applied.).

executive action" would not support taxpayer standing and, for that reason, the Court was at pains to describe the taxpayers' as-applied constitutional claim as "a challenge to congressional taxing and spending power." *Id.* at 619.

To that end, the Court stressed that the taxpayers' challenge remained focused, on "funding authorized by Congress [that] has flowed" to outside entities and "be[en] disbursed"—not pursuant to Executive Branch discretion—but "pursuant to the [Act]'s *statutory mandate*." *Kendrick*, 487 U.S. at 619-620. The statute was "at heart a program of disbursement of funds pursuant to Congress's taxing and spending powers." *Id.* at 619-620. Indeed, the statutory text itself made four references to the involvement of outside religious groups, *id.* at 595-596, and the Court viewed it as obvious that taxpayers had standing to challenge the Act on its fact, *id.* at 618. All *Kendrick* held was that the fact that the Executive Branch played a necessary part in putting that "[statutory] program of disbursement" into effect by disbursing funds to particular recipients did not make the as-applied challenge to the statute "any less a challenge to congressional taxing and spending power." *Id.* at 619, 620; see *id.* at 620 (finding "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute").[7]

Here, by contrast, there is no statutory mandate—much less any "[statutory] program of disbursement," *Kendrick*, 487 U.S. at 619—for taxpayers to challenge. The best that respondents can point to is a non-discrete set of "Congressional budget appropriations." Br. 32. But respondents' complaint

---

[7] Although respondents' suggest that the government is merely reprising its unsuccesful argument in *Kendrick* (Br. 25-27), it is worth noting that not only is the context completely distinct, but also that the entirety of the government's standing argument in *Kendrick* consisted of two footnotes. See U.S. Br. 31 n.24, *Kendrick*, *supra*, (No. 87-253); U.S. Reply Br. 2 n.2, *Kendrick*, *supra* (No. 87-253).

is not with those general appropriations, but with the discretionary actions of the Executive Branch. Nor does the challenge before this Court take issue with any congressionally directed disbursements to outside entities that fit *Flast*'s historic paradigm for taxpayer injury. Unlike the plaintiffs in *Kendrick*, respondents here have utterly failed to identify any "direct dollar-and-cents injury" (*Doremus*, 342 U.S. at 434) that confers standing.

2. *Respondents Do Not Challenge the Constitutionality of Federal Law As Applied*

The fundamental flaw in respondents' argument is that it equates an as-applied challenge to an Act of Congress with a challenge to the Executive Branch's discretionary use of general appropriations. See Resp. Br. 32-34. In respondents' view, challenges to the constitutionality of an Executive Branch action that entails the "spending of funds" (*id.* at 27)—which is essentially everything the Executive does—is the equivalent of an as-applied challenge to an appropriations law. That argument is foreclosed by precedent, common experience, and Article III's constitutional command.

a. Precedent

The Court's decision in *Valley Forge* squarely rejected the argument that the Executive Branch's "spending of funds" (Resp. Br. 27) is sufficient to support taxpayer standing. "[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." 454 U.S. at 477; see *id.* at 479 n.15 (objecting to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not support standing). That language was not accidental. The Court expressly considered and rejected the contention that the taxpayers' standing to bring suit "extends to the Government as a whole, *regardless of which branch is at work in a particular instance*, and re-

gardless of whether the challenged action was an exercise of the spending power." *Id.* at 484 n.20 (emphasis added).

This case presents an *a fortiori* application of *Valley Forge*. The challenged use of taxpayer money here is for the discretionary administrative expenses associated with the day-to-day activities of government officials (such as salaries and resource costs). See Pet. Br. 26 n.8; Pet. App. 73a-77a. Unlike *Valley Forge*—where the government conveyed a 77-acre tract of land to a Christian college, 454 U.S. at 468—in this case there is no allegation that petitioners disbursed *any* federal funds, property, or other form of governmental largesse to entities outside the government. The most that is alleged is that Executive officials' conduct was intended to create a "climate conducive to funding." Pet. App. 76a. Furthermore, while meetings and discussions between government officials and religious groups are commonplace and unobjectionable (see Pet. Br. 39-41 & n.13), preferential governmental grants of land (glebes) to religious entities for their religious use was as much a hallmark of established religions as support through taxation.[8]

In addition, the Executive Branch activity at issue in *Valley Forge* involved the devotion of substantial agency resources to evaluating property and determining whether use of the property by a religious or secular entity would provide "the greatest public benefit," *Valley Forge*, 454 U.S. at 466-467 & n.4 (citing 34 C.F.R. 12.5, 12.9(a) (1980)), as well as monitoring its use after the transfer, 80-327 J.A. 15. Under that program, the government had authorized more than 650 different transfers of surplus government property to reli-

---

[8] See, *e.g.*, *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 60 (1890); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Pt. 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2148-2151 (2003).

gious institutions, the fair market value of which (*in toto*) amounted to nearly $26 million.[9]

Respondents summarily dismiss *Valley Forge* as involving the use of taxpayer funds for administrative expenses that "would not have been 'fairly traceable' to the challenged conduct" (Br. 37-38). That argument only serves to underscore the arbitrary nature of respondents' "traceability" inquiry. The taxpayer dollars spent to purchase and improve the land was a matter of record, U.S. Br. 5-6, *Valley Forge*, *supra* (No. 80-327), and the identities of the committees of agency officials and agency activities involved in the transfer decision and process (such as conducting land surveys and economic studies) were known or at least sufficiently knowable to trace some taxpayer dollars to the program, see *id.* at 22 n.11; J.A., *Valley Forge*, *supra*, 13-15 (No. 80-327). At a minimum, the surplus property program provided substantially more hard data for identifying the expenditure of taxpayer funds than discerning what portion of agency salaries and day-to-day administrative expenditures might have been employed with the "inten[t] to preferentially promote" an allegedly unconstitutional funding "climate." Pet. App. 76a.[10]

Respondents' theory that an as-applied challenge to a statute and a challenge to the Executive's discretionary or regulatory activity are fungible is also wholly incompatible with *Doremus* v. *Board of Education*. In *Doremus*, the Court, in a decision by Justice Jackson, rejected taxpayer standing to

---

[9] *Americans United for Separation of Church & State, Inc.* v. *Department of Health, Educ. & Welfare*, 619 F.2d 252, 254 (3d Cir. 1980), rev'd, 454 U.S. 464 (1982).

[10] Respondents' alternative argument that *Kendrick* overruled that aspect of *Valley Forge* that prohibited taxpayer challenges to agency action is simply wrong. The Court in *Kendrick* emphasized its adherence to precedent, 487 U.S. at 618, and would have had no need to end its standing decision by emphasizing that the plaintiffs' challenge was to "a program of disbursement of funds pursuant to Congress' taxing and spending powers" and "statutory mandate" if challenges to executive action sufficed, *id.* at 619-620.

challenge a state statute that enlists teachers in the reading of the Bible to students during the school day. 342 U.S. at 434. While the teachers' salaries and purchase of the Bibles were funded with tax dollars, the Court rejected the notion that the plaintiffs suffered any injury as taxpayers, explaining that "the grievance which it is sought to litigate here is not a direct dollar-and-cents injury but is a religious difference." *Ibid.* The Court was careful to preserve *Doremus* in *Flast*, as an example of a program that inflicts a regulatory injury, rather than a dollars-and-cents injury. See *Flast*, 392 U.S. at 102. The taxpayers challenge in this case to the actions of Executive officials at conferences is no more a "good-faith pocketbook action" (*Doremus*, 342 U.S. at 434) than the challenge asserted unsuccessfully in *Doremus*.[11]

b. Established Usage

Respondents' effort to blur the distinction between as-applied challenges to statutes and challenges to Executive actions ignores established practice. In the typical as-applied challenge, a plaintiff challenges the application in a particular context (usually, but not always, by virtue of some executive act of enforcement) of statutory terms, conditions, and prohibitions chosen by Congress to accomplish particular legislative goals.[12] Thus, pursuant to the statutory program at issue in *Kendrick*, Congress specifically directed the inclusion of

---

[11] *Doremus* and this Court's subsequent decision in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), which invalidated Bible reading in a case brought by plaintiffs who suffered direct Article III injuries, *id.* at 224 n.9, also make clear that rhetoric by respondents and their amici about Executive Branch misconduct going unexamined if taxpayers cannot sue is wide of the mark. Although the absence of an alternative plaintiff does not suspend Article III's limitations on standing, *Valley Forge*, 454 U.S. at 489, in most cases, the consequences of not permitting every federal taxpayer to sue will not result in the absence of an appropriate plaintiff to litigate alleged misconduct.

[12] See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1 (2005); *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

religious entities, see 487 U.S. at 593-596 (discussing statutory provisions), and the as-applied challenge for which the Court found standing focused on the constitutionality in actual operation of "the partnership between governmental and religious institutions *contemplated by the AFLA*," *id.* at 623 (O'Connor, J., concurring) (emphasis added).

Respondents have brought no such as-applied challenge in this case. They do not argue that the general criteria that accompany lump-sum appropriations to the Executive Branch are unconstitutional either on their face or as applied. Respondents have not even identified the specific appropriations laws pursuant to which the activities at issue here were allegedly funded (Pet. App. 10a), let alone taken issue with the application of express statutory criteria in a particular context. The best that respondents have mustered (Br. 32) is an allegation that "Congressional budget appropriations" are somewhere in the picture. But the Executive Branch's discretionary judgment concerning "[t]he allocation of funds from a lump-sum appropriation is an[] administrative decision traditionally regarded as committed to agency discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993). Indeed, it is "a fundamental principle of appropriations law" that, when Congress "appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Ibid.* Under those circumstances, it is clear that respondents' challenge, like that of the plaintiffs in *Valley Forge* and *Doremus*, is a challenge to Executive action, not a challenge —either facial or as-applied—to a taxing and spending decision of Congress.

Moreover, when a challenge shifts from the actual application of a statute in a concrete setting to the general actions of the Executive Branch, the prospects for litigating non-final, unripe, or abstract disputes rises substantially. An important function of the traditional Article III requirements is to en-

sure that only concrete disputes are litigated. See, *e.g.*, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222 (1974).[13]

c. Constitutional Limits

For four decades, historical experience has defined and set the contours of *Flast*'s narrow exception to Article III's general prohibition on taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864-1865. *Flast* was careful not to hold that the Establishment Clause itself, in all of its applications, warrants an exception to Article III. Courts have no authority to suspend Article III's constitutional limitations on their own jurisdiction, and the Establishment Clause itself has no greater claim to judicial enforcement than any other provision of the Constitution. *Flast* accordingly established its dual requirements that taxpayers (i) challenge Congress's exercise of its taxing and spending power, and (ii) allege a violation of a specific constitutional limitation on that power to ensure that its exception for taxpayer standing corresponded directly with the historic right not to "contribute three pence * * * for the support of any one [religious] establishment," 392 U.S. at 103. Respondents, like the court of appeals, would unravel both of these settled limits and thus would unmoor the *Flast* exception from any conceivable connection to Article III.

First, respondents would reduce the initial *Flast* prong to a pleading ritual. Because virtually all Executive (and Judicial) Branch activities entail the "spending of [taxpayer] funds" (Resp. Br. 27), the only real limitation on taxpayer suits that respondents would recognize would be a require-

[13] In addition, common usage rebels at the suggestion that every discretionary judgment by government officials that entails the use of taxpayer funds implicates the constitutionality of an appropriations law as applied. Every search and seizure requires law enforcement agents to spend appropriated funds, but any unconstitutional search or seizure that results does not, by reason of that use of taxpayer funds, implicate the constitutionality of the agency's appropriations law as applied.

ment that the Establishment Clause be invoked. The court of appeals attempted to limit that breach in Article III by adopting a "marginal or incremental cost" exception to taxpayer standing, Pet. App. 12a. But that approach is so constitutionally indefensible—Madison's objection was to a tithe of a mere three pence—and administratively impracticable (see Pet. Br. 36-38) that respondents themselves have abandoned it and candidly acknowledge that "the size of the expenditure" is not "relevant" (Br. 20 n.6).

Respondents propose in its place (Br. 19-21, 27, 33) their ill-defined traceability test. There are several problems with that approach. To begin with, this Court has never conceived of its taxpayer standing cases as being primarily about traceability. See, *e.g.*, *Valley Forge*, 454 U.S. at 480 n.17 (prefacing the Court's discussion of the "at best speculative and at worst nonexistent" nature of the "connection between the challenged property transfer and respondents' tax burden" as "not necessary to our decision"); *id.* at 497 n.10 (Brennan, J., dissenting) ("[T]he cases in which a tenuous causal connection between the injury alleged and the challenged action formed the basis for denying plaintiffs standing do not control the case of a taxpayer challenging a Government expenditure.").

Furthermore, traceability is just *one* of the "requisite" standing elements. A plaintiff still must demonstrate an injury in fact, as well as redressability. *DaimlerChrysler*, 126 S. Ct. at 1861; see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Taxpayers generally lack standing to challenge government policies they dislike because they lack all three of Article III's irreducible minima for standing, including but not limited to the reality that any alleged injury stemming from the use of federal tax money alone is *not* meaningfully traceable to individual taxpayers. More directly, a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others," is "comparatively minute and indeterminable," and "remote, fluctuating,

and uncertain." *DaimlerChrysler*, 126 S. Ct. at 1862 (quoting *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923)). Respondents utterly fail to explain what makes their current complaint any more traceable than the "injuries" from a single speech of the Education Secretary, as featured in their original complaint, Pet. App. 73a-75a, or any other Establishment Clause claim that involves some expenditure of public funds. Indeed, respondents simply declare, without explanation (Br. 47-48), that taxpayer funds cannot be traced to "[s]peeches and meetings of executive branch personnel," but can be traced to speeches or discussions and meetings at conferences, at least if they are alleged to generate an impermissible "climate." Pet. App. 76a; see Resp. Br. 21.[14]

Flast's rationale did not and could not rest on any assumption that tax dollars impermissibly spent on religious activity are any more traceable or identifiable than tax dollars spent on any other allegedly unconstitutional activity. *Flast* instead rested on the notion that challenges to congressional decisions to use tax dollars to fund outside religious groups present a sufficiently discrete and concrete injury to satisfy Article III, in the same manner that a state-imposed tithe would give taxpayers qua taxpayers a cognizable injury.

In the same vein, respondents would replace the requirement that the taxpayer identify a "specific constitutional limitation[] imposed *upon the exercise of the congressional taxing and spending power*," *Flast*, 392 U.S. at 103 (emphasis added), with the requirement that the taxpayer simply identify a constitutional limitation upon the federal government. That is because what would make Executive Branch action unconstitutional (if respondents' allegations were correct and

---

[14] Respondents propose (Br. 21) supplementing their traceability test with a "reasonable taxpayer" requirement. But they offer no framework for evaluating a taxpayer's unreasonableness, other than to emphasize that suits over even *de minimis* amounts of taxpayer money are permissible and hence reasonable (Br. 20 n.6).

if they stated an Establishment Clause violation) would not be the Establishment Clause's specific limitation on Congress's taxing and spending power (as would be the case in an as-applied challenge to a spending statute), but the Establishment Clause's direct application to the Executive Branch itself. Stated another way, what would make the examples of religious discrimination and proselytization that respondents cite (Br. 29-30) unconstitutional would *not* be the specific Establishment Clause limitation on congressional power referenced in *Flast*, but the Establishment Clause's independent limitations on the Executive Branch.[15]

This Court has already rejected the notion "that enforcement of the Establishment Clause demands special exceptions from [Article III's standing requirements]." *Valley Forge*, 454 U.S. at 488. And while respondents and their amici can imagine long lists of things the Executive Branch could do to violate the Establishment Clause, this Court has identified only one injury that confers taxpayer standing under Article III: The tandem legislative authority to "'extract[] *and* spend[]' * * * 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865 (emphasis added). The Executive Branch has no capacity to "extract and spend" taxpayer

---

[15] Respondents' list of supposed horribles (Br. 29-30) is not, in fact, jurisprudentially troubling. With respect to the purchase and provision of governmental property to religious entities (*id.* at 29), *Valley Forge* already precludes taxpayer standing. With respect to instances of religious discrimination (*id.* at 29-30), the victims of such discrimination could bring suit, see, *e.g.*, *Northeastern Fla. Ch. of the Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993); 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 2000bb *et seq.* Moreover, respondents' and its amici's equation of a lack of taxpayer standing with a license for government to ignore the Constitution's commands overlooks, *inter alia*, that (i) there are often plaintiffs available who have suffered traditional Article III injuries, (ii) the Executive Branch is a co-equal Branch of government whose officials are sworn to uphold the Constitution, and (iii) every other aspect of the Establishment Clause, see *Valley Forge*, *supra*, and every other provision of the Constitution has survived for more than two hundred years without being enforced in taxpayer suits.

money. The Executive Branch (like the Judicial Branch) has no independent capacity to extract taxes from taxpayers, and it can only spend taxpayer funds as Congress permits. See U.S. Const. Art. I, § 9, Cl. 7; *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990).

Finally, respondents argue (Br. 41-42) that abandoning *Flast*'s established criteria for taxpayer standing is necessary because the Framers did not contemplate that appropriations laws would afford the Executive Branch substantial discretion. That is wrong. "[T]he First Congress made lump-sum appropriations for the entire Government," and "[e]xamples of appropriations committed to the discretion of the President abound in our history." *Clinton* v. *City of New York*, 524 U.S. 417, 466, 467 (1998) (Scalia, J., concurring in part and dissenting in part); accord *id.* at 446 (majority opinion); *id.* at 470 (Breyer, J., dissenting); see also *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937).

B. *Flast* Is Limited To Challenging Congressionally Directed Disbursements Of Funds Outside The Government

The historic experience upon which the *Flast* exception rests implicated not just the congressional power to tax and spend, but a particular application of that power—decisions of the legislature to move money from the pocket of one taxpayer into the hands of another to support religious exercise. See Pet. Br. 38-45. Moreover, legislative actions that are the functional equivalent of state-compelled tithing not only were of distinct historic concern, but also present a clear nexus between the Establishment Clause injury and the status of taxpayers qua taxpayers. The exception recognized in *Flast* and *Kendrick*, therefore, is limited to the "disbursement of funds," *Kendrick*, 487 U.S. at 619, to entities outside of the government, not financing the operations of the Executive Branch. Indeed, that is precisely how Justice Harlan understood the *Flast* exception to operate. See, *e.g.*, *Flast*, 392 U.S.

at 122-123 (noting that the majority would distinguish between two programs involving equal expenditures because one is regulatory and the other involved "direct grants-in-aid"); see also *Valley Forge*, 454 U.S. at 511 (Brennan, J, dissenting) (noting that "the essential requirement of taxpayer standing recognized in *Doremus*" and *Flast* is a complaint not just about spending, but about "the distribution of Government largesse").

Respondents argue (Br. 42-45) that established religions entailed more than the extraction of taxes to subsidize the preferred church, and that taxpayer standing is necessary to ensure that the government is not "free to use taxpayer funds itself to establish religion" directly rather than through third parties (Br. 44). The Republic has survived more than 200 years without any effort on the part of the Executive "itself" to "build a church and make the facility available to a chosen religion" (Br. 44), and without the threat of taxpayer standing to challenge such an establishment. But in any event, that argument is simply a variant of the long-since rejected theory that "the Establishment Clause demands special exceptions from [Article III]." *Valley Forge*, 454 U.S. at 488.

In addition, as the amici Legal Historians explain (Br. 27), the Constitution's separation of powers "left no fear that the executive would ever be free independently to authorize the use of taxpayer dollars" for religious purposes. Amici are no doubt correct that, if the Framers had perceived Executive establishment as a serious threat, they would not have been indifferent. But, while that observation might be an answer to an argument that the Establishment Clause does not apply to actions of the Executive Branch, no one is making that argument here. And the observation that Establishment Clause violations by the Executive were all but inconceivable to the Framers only strengthens the argument that actions of the Executive did not form part of the historical concern on which the Court in *Flast* rested taxpayer standing.

The point of *Flast* was not that the central concern identified by the Court (*i.e.*, the "very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion," *DaimlerChrysler*, 126 S. Ct. at 1865) was the only way that the Establishment Clause could be violated or even the only historical practice of concern to the Framers, but rather that this particular exercise of congressional power—unlike those giving rise to other alleged violations of the Establishment Clause—was sufficiently concrete and individualized and sufficiently analogous to a state-compelled tithe to give rise to Article III standing for taxpayers. Thus, while it is true that established churches involved more than tax subsidization, the relevant point for taxpayer standing purposes is the Framers' focus on that particular aspect of colonial establishments and the clear nexus between that practice and injury as a taxpayer.[16]

If *Flast* is narrowly limited to congressional exercises of taxing and spending authority that result in disbursements to outside entities, it can be defended as an application of normal Article III principles. In those circumstances, but those alone, the net effect of Congress's taxation and spending decisions can be analogized to a state-compelled tithe that a taxpayer would have standing to attack under ordinary Article III standing principles. But if *Flast* is expanded along the lines urged by respondents, then it can only be understood as an exception to—not an application of—ordinary Article III

---

[16] It is a matter of historical debate whether the Church of England was, as respondents and their amici assume, structurally subsumed within the British government, or was instead a heavily regulated and controlled external entity that would fit the *Flast* paradigm. See, *e.g.*, McConnell, *supra*, at 2112-2115. What is most relevant for present purposes is that the model for religious taxation that was most familiar to the Framers—and the subject of Madison's Remonstrance—was the ordered payment of taxes to local churches and church entities for their religious use, rather than the payment of such taxes to a centralized governmental entity for the salaries and administrative needs of government employees. Cf. *Everson* v. *Board of Educ.*, 330 U.S. 1, 41 (1947) (Rutledge, J., dissenting) ("Tithes had been the lifeblood of establishment before and after other compulsions disappeared.").

standing principles. Needless to say, Article III courts are not free to fashion exceptions to the irreducible minimum requirements for Article III standing. Moreover, if the logic of *Flast* really requires the broad reading embraced by respondents and the court of appeals, then this Court must abide by the requirements of Article III, rather than the logic of *Flast*. Principles of *stare decisis* cannot justify the adverse possession of jurisdiction that is not granted to the courts by Article III.[17]

At bottom, respondents' complaint is not that the government itself is using tax dollars to finance the actual exercise of religion by third parties or even has taken any final, concrete agency action concerning funding for religious groups. Instead, respondents' central objection is to how government officials communicate and interact with other citizens and, in particular, Executive employees' alleged creation of a "climate" (Pet. App. 76a) that is intended to encourage eligible religious entities to participate, as they are legally entitled to do, in cooperative public programs. Their objection thus is not to the exercise of Congress's taxing and spending power as such, but to the words and actions of Executive Branch officials that respondents deem to be too favorable to religion in that they might induce other citizens to apply for federal funds, which might, in turn, someday result in some disbursement of taxpayer funds to some religious group. But when it comes to the Executive Branch's compliance with the Constitution in such routine functions, the taxpayer's interest is no different from that of the citizenry in general, all of whom have a right to—but not a chose in action to ensure—a government that obeys the Constitution. In other words, "the

---

[17] In *Flast* itself, this Court justified "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits" based only on "existence" of the "current debate" over the merits of *Frothingham*. See 392 U.S. at 94. *Flast* appears to have generated at least as much debate over its merits as *Frothingham*.

grievance which it is sought to litigate here is not a direct dollar-and-cents injury but a religious difference" over the conduct of governmental employees. *Doremus*, 342 U.S. at 434. Under Article III of the Constitution and this Court's precedents, taxpayers qua taxpayers lack standing to maintain such a claim.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

FEBRUARY 2007

No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS, INC. IN SUPPORT OF RESPONDENTS

Of Counsel:
EDWIN F. KAGIN
National Legal Diector
AMERICAN ATHEISTS, INC.
P.O. Box 559
Union, Kentucky 41091
(859) 384-7000

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
AMBER L. HUSBANDS
DAVID M. SHAPIRO
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600

Counsel for American Atheists, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
BACKGROUND	2
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE FAITH-BASED CONFERENCES INJURE TAXPAYERS AND VIOLATE THE ESTABLISHMENT CLAUSE	10
A. Taxpayers Have Standing To Challenge the Faith-Based Conferences Because the Conferences Cause Funds Appropriated by Congress To be Diverted to Religious Organizations	10
B. Training Religious Organizations To Apply for Grants at Faith-Based Conferences and Administering Grant Programs To Favor Religion Violates the Establishment Clause	15
II. EVEN CONSIDERED INDEPENDENTLY OF GOVERNMENT GRANTS, THE FAITH-BASED CONFERENCES SUBJECT TAXPAYERS TO AN ARTICLE III INJURY	18
A. The Government Misstates the Nature of the Injury By Assuming the Faith-Based Conferences Do Not Require Direct Expenditures	19
B. The Injury to Taxpayers in this Case Is No Less Concrete than the Injury in *Flast v. Cohen*	20

TABLE OF CONTENTS—Continued

Page

C. The Injury Here Involves Direct Expenditures and Therefore Does Not Resemble the Injury in *Valley Forge College v. Americans United* and Related Cases 23

D. The Court of Appeals Faithfully Applied This Court's Precedent Governing Taxpayer Standing 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Agostini v. Felton, 521 U.S. 203 (1997) 15
Allen v. Wright, 468 U.S. 737 (1984) 28
Bowen v. Kendrick, 487 U.S. 589 (1988) ..... *passim*
Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001) 17
DaimlerChrysler Corp. v. Cuno, 126 S.Ct. 1854 (2006) 21, 24, 28
Doremus v. Bd. of Educ., 342 U.S. 429 (1952) 20, 21, 25
Everson v. Bd. of Educ., 330 U.S. 1 (1947) 11, 12, 15, 16
Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*
Freedom from Religion v. Chao, 433 F.3d 989 (7th Cir. 2006) ..... *passim*
Hunt v. McNair, 413 U.S. 734 (1973) 13
Mitchell v. Helms, 530 U.S. 793 (2000) 16, 17, 18
Murray v. Curlett, 228 Md. 239 (1962) 2
Ohio Nat. Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990) 27
Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736 (1976) 13
Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 2
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 25, 26
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 27
Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 20
Tilton v. Richardson, 403 U.S. 672 (1971) 13
Torcaso v. Watkins, 367 U.S. 488 (1961) 16
United States v. Richardson, 418 U.S. 166 (1974) 25, 26
Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) ..... *passim*

TABLE OF AUTHORITIES

STATUTES AND LEGISLATIVE HISTORY Page

Central Intelligence Agency Act of 1949, 30 U.S.C. § 403a *et seq.* 25

Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm on Homeland Security and Government Affairs, 109th Cong. (2006) 7, 10

Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.* 23

OTHER AUTHORITIES

28 C.F.R. § 38.2 8

David Kuo, *Tempting Faith* 209 (2006) 4, 6, 19

Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (2001) 3

Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (2001) 2, 10

Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (2002) 3, 7

Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002) 3

Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004) 3

Fed. R. Civ. P. 12 27

George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002) 5

Government Accountability Office, *Faith-Based and Community Initiative* (June 2006) ....*passim*

Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003) 5

IN THE

Supreme Court of the United States

No. 06-157

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

American Atheists, Inc. is a volunteer organization active in protecting the rights of nonbelievers and promoting tolerance and understanding of the atheist viewpoint. Its perspective is rooted in the philosophy of materialism,

[1] The parties have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

"which holds that nothing exists but *natural* phenomena."[2] Founded in 1963 by Dr. Madalyn Murray O'Hair,[3] American Atheists has been dedicated for over forty years to advocating the separation of church and state. American Atheists founded the first known atheist library and archives in the United States, produced American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by atheists, and founded the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series. The organization also engages in legal actions to preserve First Amendment values. Accordingly, American Atheists submits this brief in support of Respondents Freedom from Religion and its members and urges the Court to affirm the decision of the Seventh Circuit Court of Appeals.

BACKGROUND

On January 29, 2001, nine days after his inauguration as President of the United States, George W. Bush issued an Executive Order that created the White House Office of Faith-Based and Community Initiatives ("OFBCI") for the express purpose of using federal funds to "expand the role" of religious organizations and "increase their capacity." Exec. Order No. 13,199, § 3(a), 66 Fed. Reg. 8,499 (2001). The Executive Order directed OFBCI to "coordinate a national effort to expand opportunities" for religious organizations and undertake "a comprehensive effort to enlist, equip, enable, empower and expand the work" of religious organizations. Exec. Order No. 13,199, pmbl. & § 2. That same day, in a separate Executive Order, President Bush directed five

---

[2] Madalyn Murray O'Hair, *Atheism*, American Atheists, *available at* www.atheists.org/Atheism/atheism.html (last visited Jan. 29, 2007).

[3] American Atheists was founded following this Court's ruling in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school Bible readings in *Murray v. Curlett*, 228 Md. 239 (1962).

federal agencies to establish Executive Department Centers for Faith-Based and Community Initiatives ("Faith-Based Agency Centers"), and instructed the Faith-Based Agency Centers to incorporate religious organizations "in department programs and initiatives to the greatest extent possible." Exec. Order No. 13,198, § 3(b), 66 Fed. Reg. 8,497 (2001).[4] On December 12, 2002, President Bush signed Executive Order 13,279, which weakened the separation between federally-funded services and inherently religious activities, allowing religious organizations to provide federally-funded services in facilities permeated by "religious art, icons, scriptures, or other symbols." Exec. Order No. 13,279, § 2(f), 67 Fed. Reg. 77,141 (2002).

To further this campaign of channeling government money to religious organizations, OFBCI in 2002 began to orchestrate a series of Faith-Based Conferences and to date has held 29 such events.[5] The Faith-Based Conferences operate as training and recruiting grounds that favor religious applicants for government grants and thereby give religious groups an advantage over secular groups in the process of applying for grants. The conferences generate a steady stream of well-crafted applications from religious groups by "provid[ing] participants with information about the government grants process and available funding opportunities"

---

[4] In subsequent Executive Orders, President Bush directed other federal agencies to establish similar Faith-Based Agency Centers. Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002); Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004).

[5] White House, *WHOFBCI Accomplishments in 2006* ("White House, *WHOFBCI Accomplishments*"), *available at* www.whitehouse.gov/government/fbci/2006_accomplishments.html (last visited Jan. 29, 2007); White House, *Logistics, Seattle, Washington, January 18, 2007* ("White House, *Logistics*"), *available at* www.dtiassociates.com/FBCI/logistics WA.cfm? location=WA (last visited Jan. 29, 2007).

and offering "various grant writing tutorials."[6] Thousands of individuals attend the Faith-Based Conferences,[7] which have trained 26,000 "new and potential federal grantees" since 2002.[8]

Apart from the grants themselves, the Faith-Based Conferences require substantial expenditures of government funds entirely separate from any costs attributable to the salaried time that Executive Branch officials use to orchestrate, manage, and attend the conferences.[9] Expenses incurred by the Faith-Based Conferences include renting ballrooms, meeting rooms, and overflow space for the massive conferences at hotels across the nation;[10] sending mailings prior to the conferences "to every church, synagogue, mosque, and social service organization within two hundred miles [of the conference location], about 20,000 invitations" per conference;[11] and allowing thousands of individuals to attend each conference. Attendance at the conferences is without charge to the participants, so that taxpayers and the public fisc bear the full financial burden of the events.[12]

The Faith-Based Conferences are designed to aid religious organizations. Atheists, agnostics, and other secular groups are discouraged from attending by the pervasively religious

---

[6] White House, *Faith-Based & Community Initiative*, *available at* www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

[7] David Kuo, *Tempting Faith* 209 (2006); United States Department of Justice, *E-Alert*, *available at* www.ojp.usdoj.gov/fbci/newsletters/ealert002.htm (last visited Jan. 29, 2007).

[8] White House, *WHOFBCI Accomplishments*.

[9] Kuo, *Tempting Faith*, at 231.

[10] *Id.* at 211; Amy Sullivan, "Patron Feint," *New Republic*, Apr. 3, 2006.

[11] Kuo, *Tempting Faith*, at 209.

[12] White House, *Logistics* (stating that the conferences are free for attendees).

atmosphere of the Faith-Based Conferences, which include prayer and performances of "All Hail, King Jesus" by religious choirs.[13] At a typical conference, President Bush opened his remarks by assuming that there was not a single atheist or agnostic in an audience of over one thousand: "You love God with all your heart and all your soul and all your strength."[14] The President's assumption evidently was correct, for the audience responded enthusiastically to his speech by shouting "Preach on, brother!"[15] In remarks at another Faith-Based Conference, then-Attorney General John Ashcroft, after identifying "faith" as a "fundamental value[] that define[s] our nation," made the same assumption, telling the audience, "through the message of faith, you uphold our values."[16]

American Atheists is unaware of any events designed to train atheist, agnostic, or other secular nonprofit groups to apply for grants. By singling out religious groups for special training, the government has provided a unique advantage over other groups in the process of applying for government funds.

By welcoming the faithful, and making it clear that atheists and agnostics need not attend, the Faith-Based Conferences ensure a constant flow of grant applications from religious organizations. The Executive Branch then discriminates further between applicants in selecting grantees on

---

[13] Adelle M. Banks, "Bush Touts His Faith-Based Initiative Despite Congressional Foot-Dragging," *Religion News Service*, June 2, 2004, *available at* pewforum.org/news/display.php?NewsID=3481 (last visited Jan. 29, 2007).

[14] George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002).

[15] *Id.*

[16] Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003).

the basis of religion. According to a former Special Assistant to President Bush, the grants process is rife with religious discrimination. Kuo, *Tempting Faith*, at 212-16. In awarding grants from the Compassion Capital Fund, a grants program created by Congress in 2002 under the Taxing and Spending Clause, the Department of Health and Human Services convened "an overwhelmingly Christian group of wonks, ministers, and well-meaning types" whose "biases were transparent." *Id.* at 213-14. The group was tasked with rating organizations on a scale from 1 to 100, and these ratings determined which organizations would receive grants.[17]

According to Kuo, "[i]t was obvious that the ratings were a farce." Kuo, *Tempting Faith*, at 214. In fact, one of the raters stated that "when [she] saw one of those non-Christian groups in the set [she] was reviewing," she "just stopped looking at them and gave them a zero." *Id.* at 215-16. She further stated that such behavior was typical among the raters. *Id.* at 216. Due to such conduct, "Jesus and Friends Ministry from California, a group with little more than a post office box," scored much higher than Big Brothers/Big Sisters of America and other leading national charities. *Id.* at 214.

This system of using Faith-Based Conferences to give religious organizations an advantage in applying for grants and then selecting grantees on the basis of religion has achieved the desired result. According to the congressional testimony of a Department of Housing and Urban Development (HUD) official, the Faith-Based Conferences contributed to a major increase in HUD funding for religious

---

[17] Kuo, *Tempting Faith*, at 214-15. *See also* Government Accountability Office, *Faith-Based and Community Initiative* 6 (June 2006) ("*GAO Report*") (stating that the decisions to award grants "were generally based on applicants' scores" assigned by raters).

organizations between Fiscal Years 2002 and 2004,[18] and in Fiscal Year 2005, religious organizations received $2.1 billion in federal grants, nearly twice what they received in Fiscal Year 2003.[19] The White House announced that "[d]ue to the President's leadership, more faith-based organizations are participating in the Federal grants process," and that the Department of Health and Human Services has nearly doubled the number of grants to religious organizations since Fiscal Year 2002.[20]

Additionally, after channeling unprecedented levels of monetary aid to religious organizations, the Executive Branch has turned a blind eye when recipients divert the money to inherently religious activities. On paper, a religious organization is not allowed to misuse federal funds by offering activities such as prayer during government-funded services, such as counseling.[21] According to GAO, however, religious organizations often flout this requirement in practice. *GAO Report* at 6-7, 34-36. After surveying 13 organizations that receive federal grants and offer voluntary religious services, GAO found that four of these organizations "did not appear to understand the requirement to

---

[18] *See Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm on Homeland Security and Government Affairs*, 109th Cong. 58 (2006) (statement of James M. Martin, Acting Deputy Chief Financial Officer, HUD).

[19] White House, *Fact Sheet: Compassion in Action* (March 2005) ("White House, *Fact Sheet*"), *available at* www.whitehouse.gov/news/releases/2005/03/20050301-1.html (last visited Jan. 29, 2007); White House, *WHOFBCI Accomplishments*.

[20] White House, *Fact Sheet*.

[21] *See* Exec. Order No. 13,279, § 2(e) ("[O]rganizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance . . .").

separate [inherently religious] activities in time or location from their program services funded with federal funds." *Id.* at 7. One religious organization official told GAO "that she discusses religious issues while providing federally funded services," and others stated that they "pray with beneficiaries during program time." *Id.* Another religious organization official confessed that she began government-funded social services for children by reading from the Bible. *Id.* at 35.

According to GAO, several federal agencies fail to visit more than 5 to 10 percent of grant recipients in a given year. *Id.* at 37. GAO further stated that "[f]ew government agencies administering [grant] programs monitor organizations to ensure compliance with [] safeguards" regarding inherently religious activities. *Id.* at 6-7, 29. GAO reviewed financial and performance reports submitted to federal agencies by religious organizations that received federal grants, but "none of the reports . . . contained any questions related to compliance with the safeguards" that prohibit the use of government funds in inherently religious activities. *Id.* at 36. GAO also reported that the Department of Justice's Community Corrections Contracting program contained "no reference to the prohibition on inherently religious activities," which "could be read as allowing all providers of social services in [correctional] settings to engage in worship, religious instruction, or proselytization."[22] In sum, GAO concluded that "the government has little assurance" that safeguards surrounding the use of federal funds are enforced. *Id.* at 52.

GAO further found that in many cases federal agencies not only fail to monitor the use of grant money but neglect even to inform religious organizations of their legal obligations. *Id.* at 30-34. In fact, most federal agencies that provide grants to religious organizations do not even tell grant recipients that

---

[22] *GAO Report* at 32. *See also* 28 C.F.R. § 38.2(b)(2).

they cannot discriminate on the basis of religion in providing social services. *Id.* at 29.

SUMMARY OF ARGUMENT

The Faith-Based Conferences at issue in this case lie at the heart of a scheme to funnel tax dollars to religious organizations in violation of the Establishment Clause of the First Amendment. As a training ground that favors religious organizations in identifying and applying for grant funds appropriated by Congress under the Taxing and Spending Clause, the conferences directly result in the award of government money on the basis of religion. Not only do the conferences single out and favor sectarian organizations by hosting what amounts to religious pep rallies, the unconstitutional impact is exacerbated by discrimination in the selection of grantees that receive government funding. Moreover, through lax oversight, federal funds earmarked for various secular social programs ultimately are spent to support inherently religious activities, such as prayer and prosthelytizing.

This Court has held that the Establishment Clause exists to prevent Congress from using its taxing and spending power to foster religion, *Flast v. Cohen*, 392 U.S. 83 (1968); *Bowen v. Kendrick*, 487 U.S. 589 (1988), and that Executive Branch misuse of grant funds appropriated by Congress inflicts an Article III injury on taxpayers. As in *Flast* and *Kendrick*, the taxpayers in this case have standing because the Faith-Based Conferences injure them by directly promoting a religious message and by causing congressionally appropriated grant funds to flow to religious organizations.

Although the Faith-Based Conferences are part of a broader scheme of religious discrimination in disbursing government grants, the expenditures necessary to support the conferences, even standing alone, inflict an Article III injury. Convened in ballrooms and conference rooms of hotels across

the nation, and attended by thousands of officials from religious organizations, the Faith-Based Conferences require substantial out-of-pocket expenditures, *i.e.*, costs over and above expenses that would accrue regardless of whether the conferences were held. Accordingly, contrary to the government's view, this case does not involve merely a challenge to government officials' use of salaried time or to general overhead expenses. Rather, the taxpayers in this case also contest direct spending that inflicts a concrete and palpable injury on taxpayers and directly assaults the public fisc.

ARGUMENT

I. THE FAITH-BASED CONFERENCES INJURE TAXPAYERS AND VIOLATE THE ESTABLISHMENT CLAUSE

A. Taxpayers Have Standing To Challenge the Faith-Based Conferences Because the Conferences Cause Funds Appropriated by Congress To be Diverted to Religious Organizations

The Faith-Based Conferences form an indispensable component of the Executive Branch's drive to "enlist, equip, enable, empower and expand the work" of religious organizations, Exec. Order No. 13,199, § 2, and to do so by discriminating against secular groups in the award of government funds. According to Executive Branch officials themselves, the increase in government grants is a "demonstrated benefit[] of conference activities," *Federal Agencies and Conference Spending*, 109th Cong. 57-58, and government funding for religious organizations nearly doubled between Fiscal Year 2003 and Fiscal Year 2005, *see supra* pp. 6-7. This dramatic increase in funding for religion is the direct result of an integrated scheme of religious discrimination in which the Executive Branch first uses the Faith-Based Conferences as a means of giving religious groups a leg up in the application process and of generating an increased pool of

well-crafted grant applications from them, and then discriminates on the basis of religion in deciding which applicants will receive grants. *See supra* pp. 3-6. In short, the Faith-Based Conferences directly cause injury to taxpayers by diverting funds appropriated by Congress to religious groups.

The use of tax dollars to support religion is the very type of injury the Establishment Clause was designed to prevent. Although "[a] large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support . . . government favored churches," many settlers suffered from the "practices of the old world" even in the colonies. *Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947). Such abuses of the power to tax and spend "aroused . . . indignation" and engendered "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." *Id.* at 11. In the Virginia Assembly, "Thomas Jefferson and James Madison led the fight" against taxation that supported Virginia's established church. *Id.* at 11-12. In his Memorial and Remonstrance Against Religious Assessments, James Madison, "who is generally recognized as the leading architect of the religion clauses of the First Amendment," stated that the taxing and spending power has the potential to injure taxpayers because "'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.'" *Flast*, 392 U.S. at 103 (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)). Renewal of the tax was defeated in committee, and the Virginia Assembly squarely condemned taxation that supports religion by enacting Thomas Jefferson's Virginia Bill for Religious Liberty, which proclaimed that "to compel a man to furnish contributions of money for the propagation of opinions which

he disbelieves, is sinful and tyrannical." *Everson*, 330 U.S. at 12.

Like the Virginia Bill for Religious Liberty, the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." *Id.* at 8. Animated by concern that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general," the Establishment Clause was "designed as a specific bulwark against such potential abuses of governmental power." *Flast*, 392 U.S. at 103-04. It exists to ensure that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions." *Everson*, 330 U.S. at 16.

Despite this specific guarantee against coercive taxation in aid of religion, if taxpayers could not challenge the use of government grants to advance religion, much of the Establishment Clause would become a dead letter. This Court's jurisprudence therefore allows a taxpayer to challenge "an exercise by Congress of its power under Art. I, s 8, to spend for the general welfare [where] the challenged program involves a substantial expenditure of federal tax funds." *Flast*, 392 U.S. at 103. Thus, in *Flast* and *Kendrick*, this Court found that taxpayers had standing to contest Executive Branch action that caused congressionally appropriated grant funds to flow to religious groups. *Id.* at 105-06; *Kendrick*, 487 U.S. at 19-20.

In this case, as in *Flast* and *Kendrick*, the Faith-Based Conferences cause specific grant funds appropriated by Congress to be diverted to religious organizations because the conferences are the primary means of training religious organizations to apply for grants and giving such organizations an advantage in the applications process. Thus, while the Faith-Based Conferences themselves are funded through general appropriations, the misuse of general appropriations

is not the only constitutional injury that they cause. Rather, the Faith-Based Conferences also inflict an injury on taxpayers by causing increasing levels of specific, earmarked funds to be transferred into the coffers of religious organizations.

By asserting that the Faith-Based Conferences cause the misuse of grant funds appropriated by Congress, the taxpayers in this case mount as an as applied challenge to Executive action under congressional spending programs. *Kendrick* discussed the distinction between facial and as applied challenges in detail and held that taxpayers have standing to assert both types of challenges. 487 U.S. at 600-02, 618-20. Whereas facial challenges directly contest the constitutionality of a congressional enactment, as applied challenges center on "the manner in which [the enactment] has been administered in practice" by the Executive Branch. *Id.* at 601. In *Kendrick*, this Court stated that its prior cases "expressly recognized that an otherwise valid statute authorizing grants," *i.e.*, a facially valid statute, can be "challenged on the grounds that the award of a grant in a particular case would be impermissible." *Id.* Although the government contended in *Kendrick* that taxpayers lacked standing to assert an as applied challenge to the Executive Branch's disbursement of funds under a congressional grants program, this Court roundly rejected the argument. *Id.* at 619. *See also Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (not questioning standing of taxpayers who "brought . . . suit for injunctive relief against the [Executive Branch] officials who administer" the Higher Education Facilities Act of 1963); *Hunt v. McNair*, 413 U.S. 734, 735-40 (1973) (not questioning state taxpayer's standing to challenge action by state executive branch under the Establishment Clause); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 741-44 (1976) (same).

The government mischaracterizes this Court's precedent when it asserts that *Flast* applies "only when the congressional spending *itself* causes the alleged injury." Pet. Br. at 27 (emphasis added). The taxpayers in *Flast*, as in *Kendrick* and in this case, did not directly contest any congressional action but rather challenged the way in which the Executive Branch expended funds appropriated by Congress under the Taxing and Spending Clause. *Flast*, 392 U.S. at 87 (taxpayers did not assert facial challenge to congressional appropriations under the Elementary and Secondary Education Act of 1965, but rather to manner in which "federal funds have been disbursed under the Act" by Executive Branch); *Kendrick*, 487 U.S. at 619 ("Indeed, Flast itself was a suit against the Secretary of [Health, Education, and Welfare], who had been given the authority under the challenged statute to administer the spending program that Congress had created."). The taxpayers in this case raise a similar as applied challenge by contesting the manner in which the Executive Branch uses the Faith-Based Conferences to channel congressional grant funds to religious organizations.

The government's view that taxpayer standing exists only to directly challenge congressional enactments would eliminate taxpayers' ability to raise as applied challenges. Taxpayers could *never* challenge the disbursement of grants as applied because such challenges, by definition, contest "the manner in which [the enactment] has been administered" by the Executive Branch, not the statute as enacted by Congress. *Id.* at 601. As the Seventh Circuit recognized, such an outcome would equip the Executive Branch with unfettered authority to use funds appropriated by Congress in aid of religion, even to the point of allowing "the Secretary of Homeland Security . . . to build a mosque and pay an Imam a salary to preach in it." *Freedom from Religion v. Chao*, 433 F.3d 989, 994 (7th 2006). Such a result would destroy the "bulwark" that the Framers built against the use of the taxing

and spending power "to aid one religion over another or to aid religion in general," *Flast*, 392 U.S. at 104, and eviscerate taxpayer standing as a means of defending rights guaranteed by the Establishment Clause.

B. Training Religious Organizations To Apply for Grants at Faith-Based Conferences and Administering Grant Programs To Favor Religion Violates the Establishment Clause

The Faith-Based Conferences are specifically orchestrated to train religious groups to apply for government grants, and they foster an atmosphere that excludes secular nonprofit groups. By catering especially to those who "love God with all [their] heart and all [their] soul and all [their] strength," the conferences function as religious rallies, hospitable only to certain religious groups. *See supra* pp. 4-5. Once the conferences serve their purpose of giving religious organizations a special advantage in the process of applying for grants by training them to submit well-crafted grant proposals, the Executive Branch selects grantees by discriminating against secular and non-Christian groups and awarding grants to obscure Christian organizations at the expense of national secular organizations with proven track records. *See supra* pp. 5-6. Finally, after religious organizations acquire government funds, the Executive Branch compounds the Establishment Clause violation by effectively allowing these organizations to use grants for prayer and prosthelytizing. *See supra* pp. 7-9.

By enabling the Executive Branch to award grants on the basis of religion, the Faith-Based Conferences force dissenters to pay "tithes and taxes," *Everson*, 330 U.S. at 10, in support of a system of religious discrimination. Holding Faith-Based Conferences and awarding grants on the basis of religion "define[s] . . . recipients [of government aid] by reference to religion." *Agostini v. Felton*, 521 U.S. 203, 234

(1997). This discrimination against non-religious groups contravenes the most basic mandate of the Establishment Clause, for the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). *See also Everson*, 330 U.S. at 15 ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government . . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."). While the government can provide aid irrespective of the religion of the beneficiaries, the scheme at issue here clearly uses religious belief as a primary criterion first in creating Faith-Based Conferences uniquely designed for religious groups and then in awarding grants on the basis of religion. *See Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) (Establishment Clause is not violated where "the religious, irreligious, and areligious are all alike eligible for governmental aid"); *Everson*, 330 U.S. 1 (holding that the government may provide busing to children who attend religious schools, so long as it does the same for other children).

After using Faith-Based Conferences to generate grant applications and preferentially awarding grants to Christian groups, the Executive Branch compounds the Establishment Clause violation by looking away as religious groups divert government money to inherently religious activities. *See supra* pp. 7-9. The Establishment Clause flatly bans diverting federal funds to support inherently religious activities. *Kendrick*, 487 U.S. at 609 ("[W]e have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion."). Therefore, the government's provision of aid to religious institutions violates the Establishment Clause unless the government creates adequate safeguards against diverting funds to religious activities. *Mitchell*, 530 U.S. at 861-63 (O'Connor, J., concurring). *See*

also Kendrick, 487 U.S. at 612 ("[W]e have . . . struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid.").

This Court has described the types of safeguards necessary to prevent the use of government funds to aid religious enterprises. In *Mitchell*, for example, Justice O'Connor listed the types of provisions that would be "constitutionally sufficient" where government funding ultimately benefited both religious and non-religious schools.[23] In that case, Justice O'Connor found safeguards against the use of aid for religious activities sufficient because they included: (1) a requirement that all private schools that receive government money sign written assurances that the funds "will only be used for secular, neutral, and nonideological purposes"; (2) monitoring by the state educational agency of each local educational agency that received funds; (3) "random review of [each] school's library books for religious content," to ensure government funds are not used to purchase religious books; (4) annual reminders to school administrators regarding the prohibition on the use of government aid for religious purposes, coupled with random sampling of materials and equipment, including library books the nonpublic school has acquired, to ensure that they comply with the program's secular content restriction; and (5) rejection of any new books a school wishes to purchase with government funds "whose title reveals (or suggests) a religious subject matter." 530 U.S. at 861-63.

---

[23] *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring). Justice O'Connor's concurrence, which Justice Breyer joined, provided the decisive votes in *Mitchell*. Because Justice O'Connor articulated a more narrow rationale than the plurality, her concurring opinion states the holding of the Court. *Columbia Union College v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001).

Needless to say, no such safeguards accompany the grants made in association with the Faith-Based Conferences at issue in this case. As the *GAO Report* reveals, the Executive Branch's "hear no evil, see no evil" approach to monitoring religious organizations that receive federal funds is a far cry from the safeguards deemed sufficient in *Mitchell*. The GAO found that the federal agencies that administer grants to religious organizations do not visit most grant recipients, *GAO Report* at 37, do not audit many grant recipients, *id.* at 36, do not ask about the diversion of federal funds to religious activities when they do conduct audits, *id.* at 6-7, 36, and often do not even inform grant recipients that federal funds cannot be used for religious activities, *id.* at 30-34. As a result, religious organizations use government funds to hold prayer and conduct Bible reading. *See supra* pp. 7-8. Lackadaisical monitoring therefore compounds the Establishment Clause violation—and the constitutional injury inflicted on taxpayers—that begins with training religious organizations to apply for grants at Faith-Based Conferences, continues through a grant applications process that discriminates on the basis of religion, and ends in religious organizations' using taxpayer money for prayer and prosthelytizing.

II. EVEN CONSIDERED INDEPENDENTLY OF GOVERNMENT GRANTS, THE FAITH-BASED CONFERENCES SUBJECT TAXPAYERS TO AN ARTICLE III INJURY

Even if they did not feed into a scheme designed to funnel federal funds to religious organizations, the Faith-Based Conferences themselves are comparable to revival meetings organized and funded at taxpayers' expense. Each of the Faith-Based Conferences requires substantial expenditures of general appropriations funds over and above the earmarked grant money that the conferences ultimately divert to religious organizations. These general appropriations expenditures are not, as the government asserts, limited to expenses

such as general overhead or salaried time that government officials use to attend, organize, and speak at the conferences. Rather, each conference costs approximately $100,000 in new, direct expenditures,[24] and the 29 conferences since 2002 have cost nearly $3 million in tax dollars. *See supra* p. 3. Even if this Court disagrees with the argument that the misallocation of earmarked grant funds caused by the Faith-Based Conferences confers standing, taxpayers nonetheless have standing to challenge the Executive Branch's misuse of tax funds to finance the conferences themselves.

A. The Government Misstates the Nature of the Injury By Assuming the Faith-Based Conferences Do Not Require Direct Expenditures

The government repeatedly downplays the expenditures necessary to bankroll the Faith-Based Conferences by suggesting such costs consist of little more than the portion of government officials' salaries that funds their attendance and activities at Faith-Based Conferences.[25] Starting from this flawed premise, the government reaches the facile and erroneous conclusion that taxpayers have not suffered a direct injury caused by the expenditure of public funds.[26]

The government's description of the claim reflects a crabbed and unreasonable version of the Amended Complaint that commenced this case, which is not confined to government officials' speeches or to other activities supported by their salaries.

---

[24] Kuo, *Tempting Faith*, at 231.

[25] *See* Pet. Br. at 24 (expenditures consist "solely . . . [of] salaries and supplies"); *id.* at 43 (this case involves "the speeches and day-to-day activities of Executive Branch officials").

[26] *See id.* at 25 (taxpayers in this case do not allege a "direct dollars-and-cents injury"); *id.* at 29 (analogizing the injury here to salaries paid to teachers who read from the Bible during class); *id.* ("[The] real complaint [of the taxpayers in this case] [is] not [a] dollar-and-cents injury . . .").

To the contrary, the Amended Complaint encompasses all expenditures necessary to plan, organize, and manage the Faith-Based Conferences: "The defendants . . . organize, set up and conduct such public events to advance funding for faith-based organizations, using Congressionally enacted budget appropriations to conduct such advocacy . . . ." Amended Compl. ¶ 39; *id.* ¶ 32 ("Defendants' actions . . . include the support of national religious conferences . . ."); *id.* ¶ 36 ("The conferences and public events organized, set up and run by the defendants . . . are funded with Congressional budget appropriations . . ."). Because this case involves a motion to dismiss, these averments and all reasonable inferences from the complaint must be drawn in favor of the non-moving party, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002), and in any event, it is patently unreasonable to assume that massive conferences, held across the nation and financed with government money, are conducted at no direct cost to the public fisc. That assumption, moreover, is plainly false, as the Faith-Based Conferences require the Executive Branch to incur direct costs. *See supra* p. 4.

B. The Injury to Taxpayers in this Case Is No Less Concrete than the Injury in *Flast v. Cohen*

This Court's precedent draws a clear line between litigants who have standing because they challenge under the Establishment Clause substantial and direct expenditures of funds appropriated by Congress, *see Flast* 392 U.S. 83; *Kendrick*, 487 U.S. 589, and litigants who lack standing because they do not challenge direct expenditures, *see Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). Here, as in *Flast*, Congress used its taxing and spending power to extract funds from taxpayers and, through appropriations, transferred these funds to the Executive Branch. *See Flast*, 392 U.S. at 85-87. Just as in *Flast*, where the Executive Branch used funds appropriated by Congress to

advance religion by financing instruction and supplies, *id.*, here the Executive Branch used the money appropriated by Congress to advance religion through the mechanism of Faith-Based Conferences. The taxpayers here face the same injury at issue in *Flast*: the use of the taxing and spending power "to favor one religion over another or to support religion in general." *Id.* at 103.

This Court reinforced the distinction between direct and indirect expenditures last term by stating that taxpayers suffer concrete and judicially redressible injuries when the government *spends* tax money to further religion, but not when taxpayers challenge government actions that have less direct effects on tax dollars. *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1865 (2006). The taxpayers in this case have suffered the very injury that the Establishment Clause exists to prevent, the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion," and courts can "redress that injury" through remedies such as "an injunction against the spending." *Id.* (quoting *Flast*, 392 U.S. at 106).

The Court of Appeals' decision hews to this Court's distinction between direct and indirect expenditures. As the Seventh Circuit stated, many government expenditures, such as the cost of praising religion in a speech, are incidental from the standpoint of injury to taxpayers—they do not add marginal costs and hence do not impact funds appropriated by Congress from the public fisc. 433 F.3d at 995-96. But the injury here involves a series of direct expenditures of taxpayer money, and consequently has an indisputable and non-incidental effect on taxpayers.

Because the taxpayers in this case challenge direct expenditures, none of the government's attempts to distinguish *Flast* withstand scrutiny. First, the government argues that this case, in contrast to *Flast*, does not involve a "direct dollars-and-cents injury," Pet. Br. at 20 (quoting *Doremus*, 342 U.S. at 434), but this contention rests solely on the

government's incorrect assumption that the taxpayers in this case do not challenge any direct expenditures. *See supra* p. 4. Compounding this fundamental error, the government then asserts that the taxpayers here challenge "'an insubstantial [*sic*—incidental] expenditure of tax funds in the administration of an essentially regulatory statute,'" which is insufficient to confer standing under *Flast*. Pet. Br. at 19 (quoting *Flast*, 392 U.S. at 102). Here again, the government assumes that the expenditures are "insubstantial" or "incidental" even though the taxpayers in this case challenge the direct expenditure of tax dollars at conference after conference.

The government also misreads *Flast* in attempting to limit the holding to cases where the government disburses funds to religious institutions. Pet. Br. 38-45. The government states that *Flast* "focused narrowly on the fear that Congress would use its power forcibly to transfer funds from taxpayers into the coffers of churches or other institutions"—a striking contention, since *Flast* involved no such transfer. *Id.* at 41. In *Flast*, the Executive Branch disbursed funds to state education agencies, which in turn directed those funds to local education agencies, which in turn used the funds to provide in-kind aid, in the form of instruction and textbooks to students, including religious school students. 392 U.S. at 86-87. Likewise, in this case, the government does not transfer funds to religious organizations but provides in-kind aid in the form of Faith-Based Conferences.

In any event, as the Court of Appeals observed, the government's distinction between in-kind and monetary aid would deny taxpayer standing where the government, without transferring funds, operates its *own* "mosque or other place of worship." 433 F.3d at 995. The government cannot claim fidelity to the original meaning of the Establishment Clause, Pet. Br. at 39-44, while advocating a test that would preclude challenges to federally-established churches. Although the government contends that such cases might allow certain

plaintiffs to bring suit in a different capacity than as taxpayers, *id.* at 34, *Flast* directly forecloses this argument. *See Flast*, 392 U.S. at 98 n. 17 ("[T]he taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.").

Finally, the government contends that *Flast* and *Kendrick* addressed grant programs funded by specific congressional appropriations whereas this case involves general congressional appropriations. Pet. Br. at 24-25. This is a difference in nomenclature, not substance. While the government purports to champion Article III's concrete injury requirement, *id.* at 14, the type of spending program at issue has no effect on the nature or concreteness of the injury inflicted on taxpayers, because in either case taxpayers suffer the same injury—Congress extracts money from them and transfers it to the Executive Branch, which uses it to further religion. *See Flast*, 392 U.S. at 103 (Framers' concern was that "taxing and spending power would be used to favor one religion over another or to support religion in general").

C. The Injury Here Involves Direct Expenditures and Therefore Does Not Resemble the Injury in *Valley Forge College v. Americans United* and Related Cases

A proper understanding of the injury at issue reveals a sharp contrast between this case and cases such as *Valley Forge*. Simply put, taxpayers suffered no injury in *Valley Forge* because the government expended no money. Rather, in that case, the Department of Health, Education, and Welfare transferred a property to a Christian college at no charge under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.*, which allows the federal government to dispose of "surplus property" that has "outlived its usefulness." *Valley Forge*, 454 U.S. at 466.

In *Valley Forge*, the only direct expenditure even remotely related to the litigation was the money the government originally spent to acquire the property, but that occurred thirty years before the transfer at issue. *Id.* at 467. The transfer itself had no impact on the public fisc.

In *DaimlerChrysler*, this Court drew a clear line that separates *Valley Forge* both from *Flast* and from this case, stating, in cases that do not involve direct expenditures, "a litigant may not assume a particular disposition of government funds in establishing standing." 126 S.Ct. at 1865. By contrast, direct expenditures, in and of themselves, constitute an Article III injury. *Id.* In *Valley Forge*, an injury to taxpayers could only be established by indulging a chain of assumptions that would ultimately result in a benefit to taxpayers—for example, if the government did not donate the "surplus property" to a religious organization, it would sell the property, realize a financial windfall, and use the proceeds to reduce taxes.[27] By contrast, when direct expenditures are at issue, as in *Flast* and here, the injury consists of the "'very extract[ion] and spen[ding]' of 'tax money,'" and that injury suffices to confer standing. *DaimlerChrysler*, 126 S.Ct. at 1865 (quoting *Flast*, 392 U.S. at 106).

Valley Forge is inapposite also because Congress passed the Federal Property and Administrative Services Act not under the Taxing and Spending Clause, as in *Flast*, but under the Property Clause. *Valley Forge*, 454 U.S. at 466. Thus, in contrast to *Flast*, *Valley Forge* did not implicate the central concern of the Establishment Clause, which "'operates as a

---

[27] In *Valley Forge*, such assumptions would likely have proven incorrect, as "there [was] no basis for believing that a transfer to a different purchaser would have added to Government receipts." *Valley Forge*, 454 U.S. at 480 n.17. Because an alternative recipient of the property, most likely another nonprofit group or local school district, would have been given the property at no cost, the decision to transfer the defunct property to a religious college did not affect the public fisc or injure taxpayers. *Id.*

specific constitutional limitation upon the exercise by Congress of the taxing and spending power.'" *Id.* at 479 (quoting *Flast*, 392 U.S. at 104). In this case, in contrast to *Valley Forge*, Congress extracted money from taxpayers under the Taxing and Spending Clause and transferred these funds to the Executive Branch, which used them to foster religion.

The government also attempts to liken this case to *Doremus*, where the Court found no taxpayer standing to challenge a state statute that provided for Bible reading at public schools, but this claim founders for similar reasons. Whereas the *Doremus* Court explicitly stated "[t]here is no allegation that this activity [Bible reading] . . . adds any sum whatever to the cost of conducting the school," *Doremus*, 432 U.S. at 433, convening Faith-Based Conferences requires direct out-of-pocket expenses, not just payment of salaries. The government therefore misses the mark entirely when it equates paying "teachers' salaries while they read from the Bible" in *Doremus* with paying "federal officials' salaries" when they attend Faith-Based Conferences. Pet. Br. at 29. In contrast to salaried time spent reading from the Bible, the expenditures at issue here impact taxpayers directly by causing the very sort of "dollars-and-cents injury" *Doremus* requires. 342 U.S. at 434.

Like *Valley Forge* and *Doremus*, other cases in which this Court has denied taxpayer standing involve government action unconnected to direct expenditures of funds appropriated by Congress. For example, the taxpayer in *United States v. Richardson*, 418 U.S. 166, 175 (1974), challenged accounting requirements applicable to the CIA under the Central Intelligence Agency Act of 1949, 30 U.S C. § 403a *et seq.*, but his suit did not involve any government expenditure and "[was] not addressed to the taxing or spending power." Likewise, the taxpayer in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), did not claim any improper expenditure but asserted the Incompatibility Clause

of the Constitution prevents simultaneous membership in the United States Congress and the Armed Forces Reserve. Aside from failing to contest direct expenditures, the plaintiffs in *Schlesinger* and *Richardson* did not assert claims under the Establishment Clause. *See Schlesinger*, 418 U.S. at 227-28; *Richardson*, 418 U.S. at 175. Therefore, no link existed between the challenged government action and the threat of using the taxing and spending power to extract funding for religious groups, the very threat that animates *Flast*. *See Flast*, 392 U.S. at 103-04.

D. The Court of Appeals Faithfully Applied This Court's Precedent Governing Taxpayer Standing

While the government confuses the nature of the taxpayer injury at issue by fixating on government officials' salaries, the Court of Appeals clearly stated that taxpayers do not have standing to assert an Establishment Clause challenge based solely on activities that do not involve direct expenditures such as the misuse of salaried time. 433 F.3d at 995. Although the government accuses the Court of Appeals of adopting a "funding ergo standing" rule under which "mere presence of federal funding is sufficient" to confer standing, Pet. Br. at 27, the Seventh Circuit did no such thing. Rather, it stated that "the fact that almost all executive branch activity is funded by appropriations does not confer standing to challenge violations of the establishment clause that do not involve expenditures." 433 F.3d at 995. In order for government action to "involve expenditures," there must be a "marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause." *Id.* Although a speech by the President entails "preparations, security arrangements, etc.," and although "an accountant could doubtless estimate the cost," the Court of Appeals held that such expenses, without more, do not confer taxpayer standing. *Id.* The Court reasoned that such costs, like official salaries, would be incurred regardless of whether the

President "mentioned Moses rather than John Stuart Mill," and hence, the decision to mention Moses would inflict no injury on taxpayers. *Id.* The Court of Appeals' decision, therefore, imposes clear limitations on taxpayer standing and does not equip each taxpayer with "roving license" to litigate Establishment Clause violations as the government maintains, Pet. Br. at 10, or "reduce the test for taxpayer standing into a pleading question."[28]

The government simply attacks a straw man of its own making when it asserts that the Framers did not remonstrate against "Executive Branch officials" using "their taxpayer-funded salaries" to "speak favorably about religion" or "meet with representatives of religious groups." Pet. Br. at 39. While the government takes pains to catalogue instances in which officials have mentioned religion in speeches, writings, and proclamations, *id.* at 39-41 & n.13, these instances do not involve direct expenditures and therefore bear no relation to this case, where the government organized and funded conferences in support of a system of grants to religious institutions. In any event, the speeches and proclamations cited by the government mentioned religion but did not advance it in any concrete sense, whereas the conferences at issue here directly aid religion by training religious groups to acquire grant funds.

---

[28] Pet. Br. at 35. In any case, the government's view that litigants can easily "plead around" standing limitations reflects a misunderstanding of the Federal Rules of Civil Procedure. In contrast to Rule 12(b)(6), which allows only facial attacks on the complaint, Rule 12(b)(1), allows factual challenges to jurisdiction, in which the District Court does not assume the truth of allegations but "weigh[s] the conflicting evidence." *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88 (1998) (challenge to standing raised on Rule 12(b)(1) motion). Therefore, regardless of what the complaint states, the government can force the plaintiff to prove that a factual basis for standing exists. *Ohio Nat. Life Ins. Co*, 922 F.2d at 325.

Finally, the distinction that the Court of Appeals drew between government activities that do and do not create new costs is firmly rooted in Article III's cases and controversies requirement. When government officials misuse their salaried time, or misuse their office space, by engaging in unconstitutional activities, any injury to taxpayers is "abstract" and "generalized," *Valley Forge*, 454 U.S. at 475. The injury would not be "redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984), because funds would be used to pay salaries and maintain offices regardless of whether a court ordered government officials to cease fostering religion. But holding massive conferences at hotels across the nation injures taxpayers by spending taxpayer dollars directly, *see DaimlerChrysler*, 126 S.Ct. at 1865, and assaults the public fisc by requiring new and immediate spending. Courts can grant concrete relief to taxpayers and relieve the unconstitutional burden on public funds by ordering the Executive Branch to cease expending taxpayer money on Faith-Based Conferences. *Id.* Such a remedy would prevent government attempts to "employ its taxing and spending powers" to discriminate on the basis of religion, the very injury the Establishment Clause was conceived to prevent. *Flast*, 392 U.S. at 104.

CONCLUSION

For the foregoing reasons, and for those set forth in the Respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

Of Counsel:
EDWIN F. KAGIN
National Legal Diector
AMERICAN ATHEISTS, INC.
P.O. Box 559
Union, Kentucky 41091
(859) 384-7000

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
AMBER L. HUSBANDS
DAVID M. SHAPIRO
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600

Counsel for American Atheists, Inc.

167

(5)

SUPREME COURT, U.S.
FILED
JUL 3 2007
OFFICE OF THE CLERK

No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

JOHN P. TUSKEY
LAURA B. HERNANDEZ
ERIK M. ZIMMERMAN
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

JAY ALAN SEKULOW
Counsel of Record
WALTER M. WEBER
COLBY M. MAY
STUART J. ROTH
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *FLAST* STANDS ALONE AS AN EXCEPTION TO THE GENERAL RULE THAT BEING A TAXPAYER IS INSUFFICIENT FOR ARTICLE III STANDING. ... 4

II. THE *FLAST* RULE IS ILLOGICAL ON ITS OWN TERMS. 5

III. THIS COURT HAS REBUTTED EACH OF THE ARGUMENTS THE *FLAST* COURT RELIED UPON TO CONFER STANDING. 6

A. This Court Has Expressly Rejected *Flast's* Core Premise. 7

B. The Particular Confusion *Flast* Perceived over Constitutional Requirements No Longer Exists. 8

C. *Flast* Improperly Disregarded Separation of Powers Concerns. 10

D. *Flast's* Reliance on Hypothetical Worst Cases Does Not Support Standing. 11

E. *Flast* Erred by Conferring Uniquely Privileged Status on Establishment Clause Claims. 12

IV. THIS COURT SHOULD OVERRULE *FLAST*. ... 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1132 (2006) 1
Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) 2
ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 10
Bowen v. Kendrick, 487 U.S. 589 (1988) 5
Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated*, 530 U.S. 1256 (2000), *reinstated on remand*, *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) 2
Children's Healthcare Is a Legal Duty, Inc. v. DeParle, 212 F.3d 1084 (8th Cir. 2000), *cert. denied*, 532 U.S. 957 (2001) 1
Christie v. United States, 31 Fed. Appx. 571 (9th Cir. 2002), *cert. denied*, 538 U.S. 946 (2001) 1
DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) 4, 9, 10, 12, 13
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 14
Flast v. Cohen, 392 U.S. 83 (1968) ..... 1, *passim*
Frothingham v. Mellon, 262 U.S. 447 (1923) 3, 4, 5, 8
Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 1
Lewis v. Casey, 518 U.S. 343 (1996) 7, 11
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 10, 12, 13
Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991) 2

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 4, 10, 11
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 9, 10
Swift v. Tyson, 41 U.S. 1 (1842) 13
United States v. Richardson, 418 U.S. 166 (1974) . 4, 10-13
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) ..... 4, *passim*
Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 9

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I ..... 1, *passim*
U. S. Const. art. I, § 8 5
U.S. Const. art. I, § 9, cl. 8 11
U.S. Const. art. III ..... 2, *passim*

INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of religious liberty. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

ACLJ attorneys often contend with arguments based upon misreadings of the Establishment Clause of the First Amendment. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting invocation of Establishment Clause as justification for viewpoint-based discrimination against private religious speech). The anomalous taxpayer standing rule fashioned in *Flast v. Cohen*, 392 U.S. 83 (1968), has opened the door to the use of the Establishment Clause as a sword against legitimate government programs or actions with faith-based elements. *See, e.g., American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) (rejecting federal taxpayer Establishment Clause challenge to AmeriCorps Education Awards Program), *cert. denied*, 126 S. Ct. 1132 (2006); *Christie v. United States*, 31 Fed. Appx. 571 (9th Cir. 2002) (rejecting federal taxpayer Establishment Clause challenge to tax exemptions for religious organizations and to National Motto), *cert. denied*, 538 U.S. 946 (2003); *Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, 212 F.3d 1084 (8th Cir. 2000) (rejecting federal taxpayer Establishment Clause challenge to provisions of

---

[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

Balanced Budget Act of 1997 accommodating religious objections of Medicare and Medicaid recipients), *cert. denied*, 532 U.S. 957 (2001); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991) (rejecting federal taxpayer Establishment Clause challenge to certain remedial services to low income students under Title I of Education Consolidation and Improvement Act of 1981); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (rejecting federal taxpayer Establishment Clause challenge to National Motto on money and on official documents).

Moreover, Establishment Clause suits have sometimes sought to restrict, not just government expressions with religious significance, but even the *allowance* by government of *private* religious expression. *See, e.g., Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated*, 530 U.S. 1256 (2000), *reinstated on remand, Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (overturning portion of injunction, issued in Establishment Clause suit, forbidding school officials from *allowing* certain student religious speech).

The ACLJ therefore strongly believes in the need for this Court to police the proper boundaries of Article III standing in Establishment Clause litigation. Whereas the *Flast* decision uniquely and unjustifiably departs from otherwise settled Article III standing doctrine, this Court should reconsider *Flast*.

SUMMARY OF ARGUMENT

Flast v. Cohen, 392 U.S. 83 (1968), represents the predicate for respondents' claim of taxpayer standing in this case. Given that developments in this Court's Article III standing jurisprudence have left *Flast* as an isolated and indefensible aberration, this Court should reconsider and overrule *Flast*.

Flast is an anomaly; in no other area of the law has this Court recognized standing for federal taxpayers *qua* taxpayers. In addition, the standing rule which *Flast* fashioned lacks a logical connection to the rationale *Flast* offered for its decision. Importantly, in its decisions since *Flast*, this Court has repudiated each and every argument the *Flast* Court made in support of its decision.

Standing limitations reflect the constitutional borders of Article III and thus serve to maintain the proper separation of powers under the Constitution. *Flast* is therefore not just a quirk in the law, but an unconstitutional breach of these crucial borders. This Court should overrule *Flast v. Cohen.*

ARGUMENT

Respondents' alleged standing in this case rests upon their status as federal taxpayers. This case therefore presents an opportunity to reexamine the sufficiency of taxpayer standing in Establishment Clause cases.

The general rule is that being a taxpayer does *not* by itself suffice to confer Article III standing to challenge federal government actions. *Frothingham v. Mellon*, 262 U.S. 447 (1923). However, in *Flast v. Cohen*, 392 U.S. 83 (1968), this Court created a limited exception for certain claims brought under the Establishment Clause.

As discussed below, this Court's refinement of the doctrine of standing in the years subsequent to *Flast* has completely undermined the rationale for that decision and left *Flast* as an isolated and indefensible departure from otherwise uniform case law. The time is therefore ripe to reconsider the vitality of *Flast.*

I. *FLAST* STANDS ALONE AS AN EXCEPTION TO THE GENERAL RULE THAT BEING A TAXPAYER IS INSUFFICIENT FOR ARTICLE III STANDING.

In *Frothingham*, this Court ruled that federal taxpayer status is insufficient to confer standing to challenge government action.

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.

262 U.S. at 488. While *Flast* subsequently opened up an exception for certain Establishment Clause claims, this Court has countenanced no other exception to the rule of *Frothingham*. On the contrary, this Court has repeatedly *rejected* such pleas of federal taxpayer standing. *See United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864-65 (2006) (no taxpayer standing to sue under Commerce Clause). Even in the context of Establishment Clause claims, this Court has refused to expand *Flast* beyond the contours of that case. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause).

In short, *Flast* stands quite alone.[2]

II. THE *FLAST* RULE IS ILLOGICAL ON ITS OWN TERMS.

The *Flast* decision is not even logically coherent.

The *Flast* Court declared that it would recognize an exception to *Frothingham* when taxpayers could demonstrate "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that statute and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

---

[2] To be sure, this Court followed "*Flast* and the narrow exception it created" in *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). But that case turned on the *scope* of this "narrow exception," and not on its defensibility. *See* 487 U.S. at 618-20.

392 U.S. at 102-03.

But as Justice Harlan pointed out in dissent, the two-part test set forth in *Flast* is "not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.* at 122 (Harlan, J. dissenting). As Justice Harlan explained regarding the first prong of the *Flast* test -- the requirement that the attack be upon a direct expenditure, not just an incidental outlay -- "it surely cannot matter to the taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed . . . as grants-in-aid." *Id.* at 123. The taxpayer's "interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Id.* Justice Harlan perceived the second *Flast* prong -- the requirement that the claim arise under a specific limitation on the spending power -- as "similarly irrelevant." *Id.* "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers." *Id.* As Justice Harlan noted, a plaintiff's interest in the suit does not "vary according to the constitutional provision under which he states his claim." *Id.* at 124.

In sum, *Flast*'s rule does not even follow from its own premises. Furthermore, as demonstrated below, even those premises have failed the test of time.

III. THIS COURT HAS REBUTTED EACH OF THE ARGUMENTS THE *FLAST* COURT RELIED UPON TO CONFER STANDING.

In addition to its internal incoherence, the premises the *Flast* opinion offered in support of its exception to the usual

standing doctrine have been thoroughly undermined by this Court's later decisions, leaving *Flast* with no legs to stand on.

A. This Court Has Expressly Rejected *Flast's* Core Premise.

While the two-part *Flast* test purported to give specific meaning to taxpayer standing doctrine, the lynchpin of the *Flast* Court's analysis came earlier in the opinion. In considering the jurisprudential foundation of Article III standing, the *Flast* Court opined that "the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101 (emphasis added). Referencing this precise passage nearly thirty years later, this Court expressly *rejected* the *Flast* approach. "This would perhaps have seemed like good law at the time of *Flast*, but *our later opinions have made it explicitly clear that Flast erred* in assuming that the assurance of 'serious and adversarial treatment' was the only value protected by standing." *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (emphasis added). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained on the legal process." *Valley Forge*, 454 U.S. at 471.

Thus, this Court has already expressly jettisoned the cornerstone of the *Flast* structure.

B. The Particular Confusion *Flast* Perceived over Constitutional Requirements No Longer Exists.

The *Flast* Court, while acknowledging the *Frothingham* rule against taxpayer standing, professed "confusion" over the difference between the strict requirements of Article III and merely prudential "policy considerations" governing limitations on standing. *Flast*, 392 U.S. at 92-94. *Cf. also id.* at 95-97 (finding uncertainty in meaning and scope of doctrine of justiciability in general); *id.* at 98-99 (describing standing doctrine as complex and vague). The relevant "confusion" no longer exists. After frankly acknowledging that the distinction between constitutional and prudential elements of standing "has not always been clear," *Valley Forge*, 454 U.S. at 471 (citing *Flast*), this Court noted that a subsequent "line of decisions, however, has resolved that ambiguity," at least regarding the "irreducible minimum" requirements of Article III, *Valley Forge*, 454 U.S. at 472.

Thus, it is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

(1) an "injury in fact" that is "concrete" and "actual or imminent";

(2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,

(3) "redressability -- a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998).[3]

It is now abundantly clear that the want of standing for a federal taxpayer claim flows not from any mere policy choices, but rather from a fundamental constitutional inadequacy. A federal taxpayer claim lacks the necessary elements of a concrete personal injury (as opposed to the same undifferentiated "injury" all citizens and taxpayers suffer from illegal government action[4]), traceability (federal tax funds being

---

[3] This Court made clear in *Steel Company* that standing cannot rest upon the fact that a plaintiff "will be gratified by seeing [a defendant] punished for its infraction and that the punishment will deter the risk of future harm." *Id.* at 106-07. To accept such reasoning "would make the redressibility requirement vanish." *Id.* at 107. With respect to the plaintiff's gratification, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* As for deterrence, every adverse ruling will deter a defendant. A "generalized interest in deterrence . . . is insufficient for purposes of Article III." *Id.* at 108-09.

The *Steel Company* Court also held that the mere prospect of an award of costs and attorney fees cannot generate standing. *Id.* at 107-08.

> We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defendant of Wildlife, 504 U.S. 555, 573-74 (1992). *See generally id.* at 574-76 (discussing cases). *Accord Cuno*, 126 S. Ct. at 1862 ("standing has been rejected in [taxpayer] cases because the alleged injury is not concrete and particularized . . . but instead a grievance the taxpayer suffers in some indefinite way in common with people generally . . . . In addition, the injury is not actual or imminent, but instead conjectural or

(continued...)

emptied into a general treasury from which appropriations are drawn), and redressability (since a successful suit would yield neither a tax refund nor any real likelihood of a reduction in the taxpayer's tax bills[5]). "Article III *requires* a demonstration of redressable injury that is *not* satisfied by a claim that tax moneys have been spent unlawfully." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added). *Accord Richardson*; *Schlesinger*; *Cuno*.

C. *Flast* Improperly Disregarded Separation of Powers Concerns.

The *Flast* Court opined that the question of standing to sue "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." 392 U.S. at 100-01.

That proposition is simply no longer tenable. As this Court has repeatedly held, the standing requirements of Article III play a vital role in maintaining the proper separation of powers between the Congress, the Executive, and the Judiciary. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Cuno*, 126 S. Ct. at 1861. "The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101. Indeed, this Court has already expressly declared that "*Flast* erred" when it "failed to

---

[4] (...continued)
hypothetical") (internal quotation marks and citations omitted).

[5] "It is pure speculation whether the lawsuit would result in any actual relief for respondents." *Cuno*, 126 S. Ct. at 1863 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality opinion of Kennedy, J.)).

recognize that this doctrine has a separation-of-powers component . . . ." *Lewis*, 518 U.S. at 353 n.3.

D. *Flast's* Reliance on Hypothetical Worst Cases Does Not Support Standing.

The *Flast* Court expressed concern that if taxpayers did not *ipso facto* have standing to bring Establishment Clause claims, then taxpayers could not sue "even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." 392 U.S. at 98 n.17. But this Court has since held that such a concern is legally irrelevant.

The hypothetical downside of a lack of taxpayer standing is by no means unique to Establishment Clause claims. Little imagination is needed to conjure up nightmarish hypothetical violations of the Statement and Account Clause and the Incompatibility Clause, for example, yet there is no taxpayer standing to challenge such violations, *see Richardson; Schlesinger*. One could likewise theorize infringements of a host of other constitutional provisions, such as the Title of Nobility Clause (U.S. Const. Art. I, § 9, cl. 8), for which a taxpayer lawsuit might be the only realistic means of bringing the violations to court. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.*

E. *Flast* Erred by Conferring Uniquely Privileged Status on Establishment Clause Claims.

The *Flast* Court perceived significance in its view that "one of the specific evils" feared by the drafters of the Establishment Clause "was that the taxing and spending power would be used to favor one religion over another." 392 U.S. at 103. This observation, however, goes to the scope of the Establishment Clause *on the merits*, not to the availability of taxpayer standing. As the Court has since observed, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576-77. And as *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted).

More recently, in *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854 (2006), this Court distinguished *Flast* and referred to its "narrow application in our precedent," 126 S. Ct. at 1865. This Court accurately described *Flast* as having "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion . . . ." 126 S. Ct. at 1865. *See Flast*, 392 U.S. at 106. While *Flast's* description of the relevant injury served to distinguish the case from *Cuno*, it underscores *Flast's* incompatibility with this Court's standing cases. For while

Flast's redefinition of the "injury" may suffice to clear the *redressability* hurdle ("an injunction against the spending would of course redress *that* injury," *Cuno*, 126 S. Ct. at 1865) (emphasis in original)), the injury as defined in *Flast* clearly fails the Article III requirements for a cognizable *injury*. Such an injury is insufficient because that injury "is shared with all members of the public." *Richardson*, 418 U.S. at 178 (internal quotation marks and citation omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

IV. THIS COURT SHOULD OVERRULE *FLAST*.

Flast was problematic from the start. In the years since *Flast*, this Court has knocked out every single rationale underpinning that decision. Like Wile E. Coyote in the old Roadrunner cartoons, *Flast* stands in midair, waiting only for that fact to be noticed before collapsing of its own weight.

If *Flast* were simply an oddity in the law, it might arguably be a tolerable error (though it ought not be), despite the unfairness of privileging only separationist taxpayer lawsuits and despite the manifest inconsistency of *Flast* with the rest of Article III case law. But *Flast* is not just an oddity -- it is an infringement on the Constitution. As demonstrated above, the injury, traceability, and redressibility elements of standing are not mere prudential rules but constitutional *requirements*. *Flast* licenses the *violation* of Article III and the *violation* of the separation of powers under the Constitution. Like the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), *Flast* represents "an

unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (internal quotation marks and citation omitted).

This Court should overrule *Flast v. Cohen*.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

John P. Tuskey
Laura B. Hernandez
Erik M. Zimmerman
American Center for Law & Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Jay Alan Sekulow
Counsel of Record
Walter M. Weber
Colby M. May
Stuart J. Roth
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amicus Curiae

January 3, 2007

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND ANTI-DEFAMATION LEAGUE SUPPORTING RESPONDENTS

STEVEN R. SHAPIRO
DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, N.Y. 10004
(212) 549-2500

AYESHA N. KHAN
RICHARD B. KATSKEE
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

K. HOLLYN HOLLMAN
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY
200 Maryland Avenue, N.E.
Washington, D.C. 20002-5797
(202) 544-4226

ANNE HARKAVY
Counsel of Record
KELLEY BROOKE SNYDER
CAROLINE ROGUS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

HOWARD W. GOLDSTEIN
STEVEN M. FREEMAN
STEVEN C. SHEINBERG
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, N.Y. 10158-3560
(212) 885-7743

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. CHALLENGES BY TAXPAYERS TO EXPENDITURES THAT VIOLATE THE ESTABLISHMENT CLAUSE COMPORT WITH CONSTITUTIONAL STANDING REQUIREMENTS 4

A. *Flast* Is Consistent With The Limits On Judicial Power Embodied In Article III Standing Doctrine 5

B. The Nature Of A Taxpayer's Establishment Clause Challenge To Federal Spending Provides The Requisite Harm To Satisfy The Three Constitutional Standing Requirements 7

C. Respondents Meet Article III Standing Requirements 13

II. *FLAST* PROVIDES AN ADMINISTRABLE RULE TO THE LOWER COURTS 14

A. *Flast* Has Not Opened The Floodgates Of Taxpayer Litigation Because It Has Been Effectively Limited To Establishment Clause Cases 15

B. Courts Have Also Limited Standing In Establishment Clause Cases To Those Federal Taxpayer Plaintiffs Challenging Expenditures Appropriated Pursuant To Congress's Tax And Spend Power 16

TABLE OF CONTENTS—Continued

Page

1. Circuit courts have denied standing where potential plaintiffs challenged conduct unrelated to Congress's power to tax and spend 16
2. Standing to challenge Executive Branch expenditures of funds appropriated pursuant to the tax and spend power does not exceed *Flast*'s limits 17

III. SETTLED PRINCIPLES OF STARE DECISIS BAR OVERRULING *FLAST* 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *Wright*, 468 U.S. 737 (1984) 12
American Jewish Congress v. *Corporation for National & Community Service*, 399 F.3d 351 (D.C. Cir. 2005) 17, 18
American Jewish Congress v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978) 18
Americans United for Separation of Church & State v. *Reagan*, 786 F.2d 194 (3d Cir. 1986) 16, 18
Bowen v. *Kendrick*, 487 U.S. 589 (1989) ..... *passim*
Brown v. *Board of Education*, 347 U.S. 483 (1954) 20
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) ..... *passim*
Dickerson v. *United States*, 530 U.S. 428 (2000) 20
Doe v. *Beaumont Independent School District*, 240 F.3d 462 (5th Cir. 2001) 14
Doremus v. *Board of Education*, 342 U.S. 429 (1952) 11, 12, 13
FEC v. *Akins*, 524 U.S. 11 (1998) 9, 10, 11
Flast v. *Cohen*, 392 U.S. 83 (1968) ..... *passim*
Friends of the Earth, Inc. v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) 10
Frothingham v. *Mellon*, 262 U.S. 447 (1923) 4, 11
Grove v. *Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985) 14
In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989) 19
Katcoff v. *Marsh*, 755 F.2d 223 (2d Cir. 1985) 16
Kirby v. *HUD*, 675 F.2d 60 (3d Cir. 1982) 18
Kurtz v. *Baker*, 829 F.2d 1133 (D.C. Cir. 1987) 16
Lamont v. *Woods*, 948 F.2d 825 (2d Cir. 1991) 17, 18, 19
Langendorf v. *Administrators of the Tulane Educational Fund*, 528 F.2d 1076 (5th Cir. 1976) 16
Lewis v. *Casey*, 518 U.S. 343 (1996) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 4, 9, 10, 12, 13, 14
McConnell v. *FEC*, 540 U.S. 93 (2003) 5
Mitchell v. *United States*, 526 U.S. 314 (1999) 20
Mitchell v. *W.T. Grant Co.*, 416 U.S. 600 (1974) 22
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 20
Payne v. *Tennessee*, 501 U.S. 808 (1991) 21
Phelps v. *Reagan*, 812 F.2d 1293 (10th Cir. 1987) 16
Planned Parenthood of Southeast Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 20, 21, 22
Pulido v. *Bennett*, 860 F.2d 296 (8th Cir. 1988) 17
Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) 5
Smith v. *Organization of Foster Families For Equality & Reform*, 431 U.S. 816 (1977) 10
Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 9, 13
Storino v. *Borough of Point Pleasant Beach*, 322 F.3d 293 (3d Cir. 2003) 15
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 21
Troutman v. *Shriver*, 417 F.2d 171 (5th Cir. 1969) 15
United States v. *Richardson*, 418 U.S. 166 (1974) 12
United States v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) 11
Valley Forge Christian College v. *Americans United For Separation of Church & State*, 454 U.S. 464 (1982) 4, 6, 9, 11, 13
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 19, 20, 22
Walz v. *Tax Commission of City of New York*, 397 U.S. 664 (1970) 9
Warth v. *Seldin*, 422 U.S. 490 (1975) 4, 5
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 (1937) 20

IN THE

Supreme Court of the United States

No. 06-157

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND ANTI-DEFAMATION LEAGUE SUPPORTING RESPONDENTS

INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the preservation and defense of constitutional rights and civil liberties. Since its founding in 1920, the ACLU has frequently advocated in

[1] No counsel for either party authored this brief in whole or in part and no persons or entities, other than amici, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

support of the religious freedoms guaranteed by the First Amendment, both as direct counsel and as amicus curiae. Because this case involves fundamental issues of religious liberty, and the ability to vindicate those rights in federal court, its proper resolution is a matter of significant concern to the ACLU and its members throughout the country.

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has been involved as a party, as counsel, or as an amicus curiae in many of the leading church-state cases that have come before the state and federal courts, including this Court. Americans United is currently serving as counsel in four cases in which the plaintiffs have asserted taxpayer standing to raise Establishment Clause claims. As an organization frequently involved in such litigation, Americans United can offer the Court special insight into the constitutional issues raised by this case.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 70 year-old education and advocacy organization that serves fourteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to religious liberty for all Americans. BJC has participated as amicus curiae in many of the major religious liberty cases before the Supreme Court.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 750,000 members and activists nationwide. PFAWF has frequently represented parties and filed amicus curiae briefs in litigation seeking to

defend First Amendment rights, including cases concerning religious liberty and violations of the Establishment Clause. PFAWF has joined in filing this amicus brief in order to help defend the important principles of standing and access to justice at stake in this case.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The League brings to this case a unique national perspective, acquired from day-to-day experience serving constituents across the United States, which sets it apart from the parties directly involved. Decades of work on issues related to the First Amendment's religion clauses have reinforced ADL's core belief in the importance of strict adherence to the separation of church and state as a means of reserving religious freedom and protecting our democracy. Because taxpayer standing is critically important to enforcing separation and seeking redress for its violation, ADL believes that taxpayer access to the courts is fundamental to preserving religious liberty and democracy.

SUMMARY OF ARGUMENT

Petitioners and their amici seek to erode, if not jettison, *Flast* v. *Cohen*, 392 U.S. 83 (1968). But *Flast* is a simple, straightforward application of longstanding principles that the lower courts have been able to apply with ease. The undersigned amici support affirmance of the Seventh Circuit's decision, and submit this brief to demonstrate that *Flast* is consistent with, and remains vital to, this Court's standing jurisprudence.

When taxes levied and appropriated by Congress are spent in violation of the Establishment Clause, a taxpayer may constitutionally challenge such expenditures because he suffers a direct and concrete injury that is caused by the illegal expenditure and that would be redressed by enjoining it. This principle—recognized in *Flast* v. *Cohen*, 392 U.S. 83

(1968), clarified in *Bowen* v. *Kendrick*, 487 U.S. 589 (1989), and confirmed last Term in *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854 (2006)—is not a doctrinal anomaly but rather a straightforward application of the well-settled constitutional standing requirements of injury, causation, and redressability. Moreover, because this principle is entirely consistent with this Court's general standing jurisprudence, it has been easily administrable by lower courts.

ARGUMENT

I. CHALLENGES BY TAXPAYERS TO EXPENDITURES THAT VIOLATE THE ESTABLISHMENT CLAUSE COMPORT WITH CONSTITUTIONAL STANDING REQUIREMENTS

The standing recognized in *Flast* and *Kendrick* is fully consistent with this Court's broader standing jurisprudence. Taxpayers who invoke *Flast* to challenge Establishment Clause violations must make the same individualized showing of injury, causation, and redressability required of all plaintiffs seeking standing in Article III courts. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Although the term "taxpayer standing" typically refers to a type of standing sought by plaintiffs who rely solely on their status as taxpayers and who cannot meet the constitutional elements of standing, *see Frothingham* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *see also Warth* v. *Seldin*, 422 U.S. 490, 508-511 (1975); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 476-482 (1982), the mere fact that a plaintiff objects as a taxpayer to a federal expenditure does not automatically preclude standing. *Frothingham*'s rejection of "taxpayer standing" is a proxy—a generalization about the application of constitutional principles to plaintiffs who suffer no concrete, distinct injury. "Taxpayer standing" is not an independent constitutional bar,[2] and it does not trump a court's obligation

[2] When the *Flast* Court undertook what it called a "fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits," it expressly rejected the

to evaluate standing based on the nature of the particular claims asserted in a specific case. *See Warth*, 422 U.S. at 500 (explaining that standing "often turns on the nature and source of the claim asserted"); *see also McConnell* v. *FEC*, 540 U.S. 93, 227 (2003) (same). While *Flast* may represent a departure from the general prohibition against taxpayer standing, it is not an exception to Article III's requirements. Under *Flast* and its progeny, plaintiffs who are taxpayers and who challenge federal spending as violative of the Establishment Clause do not need—and do not receive—any special dispensation from Article III's standing requirements.

A. This Court's Cases Make Clear That *Flast* Is Consistent With The Limits On Judicial Power Embodied In Article III Standing Doctrine

Far from being "out of step with the rest of Article III standing doctrine," State Attorneys General Br. 15, *Flast* emphasized the constitutional constraints on the federal judiciary and linked those constraints to limits on standing. *Flast* expressly recognized the "dual limitation placed upon federal courts by the case-and-controversy doctrine," which includes both "limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," *and* "defin[ing] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." 392 U.S. at 95. In so doing, *Flast*

Government's assertion that "the constitutional scheme of separation of powers ... present[s] an absolute bar to taxpayer suits challenging the validity of federal spending programs." 392 U.S. at 94, 98. No subsequent case has disturbed this determination. *See Kendrick*, 487 U.S. at 619-620 (granting standing to taxpayers in Establishment Clause case); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (explaining that, under *Flast*, taxpayer status can "supply the personal stake essential to standing"). Accordingly, the general rule against taxpayer standing has no force apart from the constitutionally required elements of standing.

rejected the roving "private attorneys-general" model of standing that Justice Douglas would have permitted, *id.* at 108 (Douglas, J., concurring), observing that the case-or-controversy requirement is not met "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.* at 106.

Indeed, this Court's Article III analysis last Term in *DaimlerChrysler* confirms *Flast*'s continuing significance and its consistency with modern standing doctrine. First, *DaimlerChrysler* relies on language from *Flast* to explain the link between standing rules and preserving separation of powers. *See* 126 S. Ct. at 1861 ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution.") (quoting *Valley Forge* quoting *Flast*). Second, *DaimlerChrysler* echoes *Flast*'s identification of the susceptibility of a dispute to judicial resolution as an essential element of a "case" or "controversy." *Flast* makes clear that Article III limits the federal judicial power not only "to those disputes which confine federal courts to a rule consistent with a system of separated power," but also to those "which are traditionally thought to be capable of resolution through the judicial process."[3] *Flast*, 392 U.S. at 97; *see also Valley Forge*, 454 U.S. at 472 (quoting this language from *Flast*). Likewise, *DaimlerChrysler* describes a dispute that

---

[3] This analysis makes clear that *Flast* acknowledges the separation of powers component in the Article III case-or-controversy requirement that forms the basis for the standing doctrine. Any indication to the contrary in *Lewis* v. *Casey*, 518 U.S. 343, 353 n.3 (1996), was dicta, and, in any event, was subsequently corrected in *DaimlerChrysler*, 126 S. Ct. at 1861. Furthermore, the principle elucidated in *Flast*—that the Establishment Clause is a specific limitation on the tax and spend power—provides assurance that "the federal courts will not intrude into areas committed to the other branches of government." *Flast*, 392 U.S. at 96; *see also DaimlerChrysler*, 126 S. Ct. at 1861. The judicial branch is permitted to decide a taxpayer's claim only when the taxpayer asserts that an identifiable and articulated limit on the tax and spend power has been exceeded. *See Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102-103.

satisfies constitutional standing principles as "a controversy between parties which ha[s] taken a shape for judicial decision" and is "of a Judiciary Nature." 126 S. Ct. at 1861. Thus, notwithstanding Petitioners' amici's description of *Flast* as a "withered husk," State Attorneys General Br. 23, that is "manifest[ly] inconsisten[t] with the rest of Article III caselaw," American Center for Law and Justice Br. 13, this Court's reliance on *Flast* in *DaimlerChrysler* confirms *Flast*'s continuing relevance and conclusively refutes the charge that it is disconnected from Article III jurisprudence.

B. The Nature Of A Taxpayer's Establishment Clause Challenge To Federal Spending Provides The Requisite Harm To Satisfy The Three Constitutional Standing Requirements

Contrary to the assertions of several of Petitioners' amici, *see, e.g.*, American Center for Law and Justice Br. 9; State Attorneys General Br. 14-15; Foundation for Moral Law, Inc. Br. 9-10, plaintiffs who rely on *Flast* allege standing based on a concrete and direct harm. The Establishment Clause itself provides protection against a specific injury: the improper expenditure of taxpayer funds. *See Flast*, 392 U.S. at 104 (Establishment Clause was designed "as a specific bulwark" against potential abuses of governmental power and "operates as a specific constitutional limitation" on the tax and spend power"); *id.* at 114 (Stewart, J. concurring) (stating that because the Establishment Clause "plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution"); *see also DaimlerChrysler*, 126 S. Ct. at 1865.

In *Flast*, the taxpayers had standing to bring suit under the Establishment Clause, claiming that Executive Branch officials had used funds that were appropriated by Congress to finance instruction in religious schools. *See* 392 U.S. at 85-87. The *Flast* Court observed:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was

> that the taxing and spending power would be used to favor one religion over another or to support religion in general.

Id. at 103. Consequently, a taxpayer challenging government action under the Establishment Clause has "a clear stake" in the outcome of the action, because a "logical nexus" exists between the plaintiff's taxpayer status and his claim of Establishment Clause violation. *Id.* at 102-106. The taxpayer's stake assured the *Flast* Court of the presence of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions," and which fulfills Article III's requirement that there be a case or controversy "in a form historically viewed as capable of resolution through the judicial process." *Id.* at 95, 99 (internal quotations and citations omitted).

As in *Flast*, the taxpayers in *Kendrick* were permitted to challenge Executive Branch officials' use of funds that Congress had appropriated for disbursement under a federal program for social services. 487 U.S. at 618. There, the Government argued that the taxpayers' suit was in actuality a challenge to executive action, and not to an exercise of congressional authority under Article I, § 8—the same argument the Government makes here. *Id.* at 619. The Court rejected this argument. It explained that the taxpayers' claim that federal funds were being used improperly by individual grantees was no less a challenge to congressional tax and spend power "simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Id.* As the *Kendrick* Court recognized, the appropriate inquiry is not whether the challenged expenditures required action by the Executive Branch, but whether there is "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power." *Id.* at 619-620. The participation of Executive Branch officials in disbursing those monies has no bearing on the standing analysis. Where plaintiffs "call into question how the funds authorized by Congress are being

disbursed pursuant to the . . . statutory mandate," they are challenging the tax and spend power. *See id.* at 619-620. *Cf. Valley Forge*, 454 U.S. at 489-490 (no taxpayer standing where Article I, § 8 powers not challenged, such that there was no congressional action but only an Executive Branch decision); *Kendrick*, 487 U.S. at 619 (distinguishing *Valley Forge* as a case "where the challenge was to an exercise of executive authority pursuant to the Property Clause" and not Article I, § 8).

The "constitutional minimum" of standing contains three elements: the plaintiff must have suffered an injury in fact; there must be a causal connection between the injury and the conduct complained of; and it must be likely that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-561. The type of standing recognized in *Flast* and *Kendrick* is entirely consistent with this "constitutional minimum."

1. *Flast* and its progeny require plaintiffs to demonstrate the requisite injury in fact, "a requirement that helps assure that courts will not pass upon abstract, intellectual problems, but adjudicate concrete, living contests between adversaries." *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (internal citations and quotations omitted); *see Lujan*, 504 U.S. at 560 (injury must be "an invasion of a legally protected interest" that is concrete and particularized and actual or imminent); *see also DaimlerChrysler*, 126 S. Ct. at 1862 (same); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (same). Each taxpayer plaintiff is directly injured by the improper expenditure of tax dollars, which is the precise harm that the Establishment Clause was designed to prevent. *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970) ("For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").[4] As this

[4] The *Flast* Court observed:

Court recognized last Term, the injury suffered by the taxpayer in Establishment Clause challenges to federal spending is "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler*, 126 S. Ct. at 1865. Moreover, the injury is the fact that the taxpayer's "money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106.

Furthermore, the taxpayer's injury, as a "concrete and particularized" harm, *Lujan*, 504 U.S. at 560, fits squarely within the realm of cognizable injuries sufficient for Article III standing. Indeed, outside the Establishment Clause context, this Court has granted standing for plaintiffs with far more attenuated injuries. *See, e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181-182 (2000) (standing established where environmental plaintiffs averred that defendant's activities directly affected plaintiffs' recreational and aesthetic interests in affected area); *Akins*, 524 U.S. at 21 (injury in fact consisted of voters' inability to obtain relevant financial information regarding organization alleged to be a political committee); *Lujan*, 504 U.S. at 566-567 (a person who observes or works with a particular animal threatened by a federal decision "is facing perceptible harm" for standing purposes); *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 841 (1977) (foster parents had standing to raise the

---

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.

Flast, 392 U.S. at 103-104 (internal citations omitted).

rights of children); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-689 (1973) (alleged harm from inability to use natural resources was "specific and perceptible harm" for standing purposes).

The concrete and particularized harm recognized in *Flast* and *Kendrick* contrasts sharply with the harms alleged in cases in which this Court has denied standing to taxpayers. In *Frothingham*, for example, a taxpayer complained that an appropriation violated the Tenth Amendment. 262 U.S. at 479. This improper expenditure, she argued, caused her direct harm because the appropriations might increase "the burden of future taxation." *Id.* at 486. But, as this Court recognized, any possible injury from an increased tax burden "is shared with millions of others, is comparatively minute and indeterminable, and ... so remote, fluctuating and uncertain" that it cannot serve as the concrete injury necessary for standing in federal courts. *Id.* at 487. In contrast, taxpayers who claim that expenditures were made in violation of the Establishment Clause suffer an immediate and direct harm from the expenditure itself, without regard for the speculative effect on their overall tax burden. *See DaimlerChrysler*, 126 S. Ct. at 1865.[5]

2. The standing recognized in *Flast* also satisfies the causation element of Article III standing. Where taxpayers are challenging government misuse of funds appropriated under Congress's tax and spend power, there is a direct link between the conduct and the harm suffered—"the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865; *see Akins*, 524 U.S. at 25 (voters' inability to obtain financial information regarding organization was a harm that was "fairly traceable" to the

---

[5] Although they brought Establishment Clause claims, the plaintiffs in *Doremus* v. *Board of Education*, 342 U.S. 429, 433 (1952), and *Valley Forge*, 454 U.S. at 480—unlike Respondents in this case—were unable to identify any appropriated funds that they alleged had been misused, and therefore were also unable to demonstrate an injury in fact.

FEC's decision that such organization was not a political committee).[6] Accordingly, the taxpayer's injury is "not the result of the independent action of some third party not before the court" but is instead "fairly traceable" to the government's alleged illegal expenditure. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

Flast makes clear that the requisite causal link is established when taxpayers challenging appropriated expenditures on Establishment Clause grounds satisfy the "logical nexus" test, which requires a link between taxpayer status and the type of program challenged, as well as a nexus between that status and the precise nature of the constitutional infringement alleged. *Flast*, 392 U.S. at 102-103. Because Establishment Clause challenges to disbursements of congressional appropriations are directed at "identifiable Government violations of law," *Allen* v. *Wright*, 468 U.S. 737, 759-760 (1984), the constitutional requirement is satisfied. *See Flast*, 392 U.S. at 102 ("[I]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."); *see also United States* v. *Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast*).

In contrast, Establishment Clause plaintiffs who fail to show a direct link between the government action and their taxpayer status consistently have been denied standing. In *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), this Court refused to grant standing to taxpayers complaining about Bible reading in public schools because they made no claims that the Bible reading was supported by any "measurable appropriation or disbursement of school-district funds

---

[6] This link between the alleged misconduct and the harm suffered is no less direct when the funds pass through the hands of Executive Branch officials. For purposes of Article III standing analysis, the touchstone event is when the appropriation is used, by any branch of the government, to fund religious activity. *See Flast*, 392 U.S. at 87-88 (upholding taxpayer challenge to executive officials' expenditure of federal funds); *Kendrick*, 487 U.S. at 589 (same).

occasioned solely by the activities complained of." *Id.* at 434. With no allegation that the complained of conduct used appropriated funds, the plaintiffs were unable to show the requisite causal relationship. *Id.* at 434-435 ("It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct."). Similarly, the plaintiffs in *Valley Forge* challenged government action pursuant to the Property Clause, rather than the Tax and Spend Clause, eliminating any nexus between the complained of conduct and the plaintiffs' standing as taxpayers. *Valley Forge*, 454 U.S. at 480; *see also Kendrick*, 487 U.S. at 619.

3. The standing permitted in *Flast* and its progeny also satisfies the redressability prong of this Court's general standing analysis. The possibility of redress for the injury "must be likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561 (internal quotations and citations omitted); *see Steel Co.*, 523 U.S. at 106-110 (holding that the relief sought by the plaintiff must serve to remedy the plaintiff's alleged injury caused by the actions of the defendant). As this Court expressly observed last Term, ordering the cessation of the improper government expenditure provides the proper redress for taxpayers claiming harm to their interest under the Establishment Clause: "an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *DaimlerChrysler*, 126 S. Ct. at 1865 (citing *Valley Forge*, 454 U.S. at 514 (Stevens, J., dissenting)).

Accordingly, this Court has made clear that the elements of Article III standing are satisfied by an Establishment Clause challenge to government expenditures of appropriated funds.

C. Respondents Meet The Article III Standing Requirements

Respondents claim that the government's expenditures of tax dollars for activities such as the sponsorship of conferences that give preference to faith-based organizations vio-

late the Establishment Clause. *See* Pet. App. 73a, 76a, 80a. Because this alleged misuse of funds directly causes a concrete injury to Respondents as taxpayers and can be remedied by the injunction that they are seeking, they have standing to bring this claim. Respondents' allegations describe the government's use of federal tax funds to support the establishment of religion. This "'extract[ion] and spen[ding] of 'tax money' in aid of religion," *DaimlerChrysler*, 126 S. Ct. at 1865, is a cognizable, direct injury to Respondents.

Similarly, Respondents allege that the funds come from dollars appropriated under the tax and spend power, Pet. App. 73a, 76a, 80a, so the alleged misconduct has a "logical nexus" to the plaintiffs' status as taxpayers. *See Flast*, 392 U.S. at 102-103. Thus, the harm is "fairly traceable" to the challenged conduct. *See Lujan*, 504 U.S. at 560.

Finally, Respondents seek, among other remedies, an injunction to prevent expenditures of tax funds that violate the Establishment Clause. Pet. App. 80a. As this Court recognized in *DaimlerChrysler*, 126 S. Ct. at 1865, the imposition of such an injunction would serve as a complete remedy to the harm suffered by Respondents as taxpayers.

II. *FLAST* PROVIDES AN ADMINISTRABLE RULE TO THE LOWER COURTS

Taxpayer standing in Establishment Clause cases is rare. We have been able to identify fewer than two dozen cases in the nearly four decades since *Flast* was decided in which federal courts of appeals have granted plaintiffs standing to bring Establishment Clause claims based solely on their status as federal taxpayers. Taxpayer standing is rare both because plaintiffs may allege other bases for standing, *see, e.g.*, *Doe* v. *Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 499 n.83 (5th Cir. 2001) (en banc) (Wiener, J., concurring in part and dissenting in part) (explaining that the majority did not need to reach the issue of taxpayer standing because it found another basis for standing); *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) (not reaching taxpayer standing because other plaintiffs had a

separate basis for standing), and because, as explained below, courts have carefully stayed within *Flast*'s—and thus, Article III's—bounds.

A. *Flast* Has Not Opened The Floodgates Of Taxpayer Litigation Because It Has Been Effectively Limited To Establishment Clause Cases

For nearly forty years, this Court has recognized that taxpayers have standing to challenge government expenditures they claim violate the Establishment Clause. Recognition of that principle has not resulted in a flood of litigation or an erosion of traditional standing doctrine. Indeed, *Flast* provides a clear barrier to any expansion of standing to those bringing suit based on hypothetical or conjectural harms, because it requires federal taxpayers to show that the challenged expenditures "exceed[] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102-103. As discussed above, the Establishment Clause acts as just such a limit. *Id.* at 104.

We are unaware, however, of any other constitutional provision that the courts of appeals have found to be a similar limit on the tax and spend power. This Court recognized as much in *DaimlerChrysler*, noting that "'only the Establishment Clause' has supported federal taxpayer suits since *Flast*." 126 S. Ct. at 1864 (internal citations omitted). This limitation provides a clear, bright-line rule for the lower courts that allows for quick dismissals of cases involving plaintiffs who do not allege direct injury of the sort suffered in Establishment Clause cases. *See Storino* v. *Borough of Point Pleasant Beach*, 322 F.3d 293, 298 n.2 (3d Cir. 2003) ("At present, the only acknowledged exception to this rule [prohibiting taxpayer standing] arises when a plaintiff challenges a government expenditure as violating the Establishment Clause."); *Troutman* v. *Shriver*, 417 F.2d 171, 173 (5th Cir. 1969) (listing an Establishment Clause claim as one of *Flast*'s requirements).

B. Courts Have Also Limited Standing In Establishment Clause Cases To Those Federal Taxpayer Plaintiffs Challenging Expenditures Appropriated Pursuant To Congress's Tax And Spend Power

1. Circuit courts have denied standing where potential plaintiffs challenged conduct unrelated to Congress's power to tax and spend

Flast provides another safeguard against widespread reliance on taxpayer standing by requiring plaintiffs to challenge expenditures of funds appropriated pursuant to Congress's tax and spend power. *Flast*, 392 U.S. at 102. In *Kurtz* v. *Baker*, 829 F.2d 1133 (D.C. Cir. 1987), for example, the plaintiff sought to challenge the constitutionality of a congressional guest chaplaincy program. The D.C. Circuit determined that he lacked taxpayer standing because the program operated under the rules of the individual houses of Congress, rather than through the tax and spend power. *Id.* at 1140. Similarly, in *Langendorf* v. *Administrators of Tulane Educational Fund*, 528 F.2d 1076 (5th Cir. 1976), the Fifth Circuit refused to grant taxpayer standing to plaintiffs because the expenditures at issue—although made by a public institution—were funded entirely by private donations and therefore had no connection to the tax and spend power. *Id.* at 1077.

Indeed, the lower courts have so rigorously applied this requirement that in some Establishment Clause cases they have erroneously rejected taxpayer standing even where the challenged appropriations were authorized by Article I, § 8, simply because the expenditures were supported by other congressional powers as well. *Americans United for Separation of Church & State* v. *Reagan*, 786 F.2d 194, 199-200 (3d Cir. 1986) (denying taxpayer standing to challenge government funding of diplomatic relations with the Vatican because the authorization for the expenditures were not "found *only* in article I, section 8, clause 1") (emphasis added); *see also Phelps* v. *Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987) (rejecting similar claim because the expenditures were "not solely dependent upon the taxing and spending clause"). *But see Katcoff* v. *Marsh*, 755 F.2d 223, 231 (2d Cir.

1985) (adopting the reasoning of the lower court, which allowed taxpayers to challenge the constitutionality of the Army's chaplaincy program because the funds were authorized at least in part by the tax and spend power). These overly restrictive cases, improperly denying standing to plaintiffs who meet *Flast*'s requirements, clearly demonstrate that the lower courts are not prone to lax, expansive applications of *Flast*.

2. Standing to challenge Executive Branch expenditures of funds appropriated pursuant to the tax and spend power does not exceed *Flast*'s limits

Flast's requirement that plaintiffs challenge the use of funds appropriated pursuant to Congress's Article I, § 8 power does not, as this Court has recognized, preclude challenges to the Executive Branch's expenditure of those funds. *See Kendrick*, 487 U.S. at 619 (explaining that plaintiffs have standing to challenge the Executive's use of appropriated funds); *Flast*, 392 U.S. at 86-87 (explaining that plaintiffs were challenging specific expenditures made pursuant to a broad appropriations statute). The lower courts have followed this guidance. *See American Jewish Congress* v. *Corporation for Nat'l & Cmty. Servs.*, 399 F.3d 351, 355-56 (D.C. Cir. 2005); *Lamont* v. *Woods*, 948 F.2d 825, 829-31 (2d Cir. 1991); *Pulido* v. *Bennett*, 860 F.2d 296, 297-298 (8th Cir. 1988) (stating that *Kendrick* "makes clear that federal taxpayers do have standing to raise Establishment Clause challenges to executive administration of congressional spending programs" and allowing a taxpayer to challenge expenditures of appropriated funds by the Secretary of Health and Human Services).

Although Petitioners assert that the Seventh Circuit introduced conflict on this issue in the lower courts, *see* Pet. 23, we have been unable to identify a single circuit in which a federal taxpayer is currently prohibited from bringing a claim that the Executive's authorized use of funds appropri-

ated pursuant to Article I, § 8 violated the Establishment Clause.[7] Petitioners point in particular to conflicts with the D.C. and Second Circuits. Pet. 23-25. No such conflict exists.

Although the D.C. Circuit decided in *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978), that federal taxpayers could not bring Establishment Clause challenges to Executive action, that case was decided prior to this Court's decision in *Kendrick*. In *American Jewish Congress* v. *Corporation for National & Community Service*, 399 F.3d 351 (D.C. Cir. 2005), the D.C. Circuit explicitly concluded, in light of *Kendrick*, that the *Flast* rule encompassed taxpayer Establishment Clause claims based on "the manner in which the Executive Branch is administering" a tax-and-spend statute. *Id.* at 355. Such a challenge satisfies *Flast*'s "nexus" requirement because "[a] 'claim that funds appropriated by Congress are being used improperly by individual grantees' is no less 'a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by' an executive official." *Id.* (quoting *Kendrick*, 487 U.S. at 619).

Similarly, the Second Circuit, in *Lamont* v. *Woods*, concluded that federal taxpayers had standing to bring an Establishment Clause claim against specific grants made by the Executive Branch from appropriated funds. 948 F.2d at 830.

---

[7] The Third Circuit, in a case decided before *Kendrick*, noted that this Court stated in *Valley Forge* that "*Flast* did not even reach Executive Branch actions." *Americans United for Separation of Church & State*, 786 F.2d at 200; *see also Kirby* v. *HUD*, 675 F.2d 60, 65 n.9 (3d Cir. 1982) (noting in dicta that plaintiffs would not have taxpayer standing to bring a non-Establishment Clause claim in part because "*Flast* limits taxpayer standing to challenges of exercises of congressional power and is not applicable to the action of administrative agencies such as HUD which are extensions of the Executive Branch"). Not only does *Kendrick* clearly foreclose the Third Circuit's reasoning, but that statement is merely dicta in any event; the court concluded that the plaintiffs lacked standing because the funding was appropriated pursuant to the Necessary and Proper Clause, rather than the tax and spend power. *Americans United for Separation of Church & State*, 786 F.2d at 199.

In doing so, the court distinguished *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), a case that Petitioners argue is in conflict with the Seventh Circuit's decision below. Pet. 24. Unlike the *Lamont* plaintiffs, the federal taxpayers in *Catholic Conference* "claimed the agency was acting *ultra vires* in its statutory authority." *Lamont*, 948 F.2d at 831; *see also Catholic Conference*, 885 F.2d at 1028 ("The complaint centers on an alleged decision made solely by the Executive Branch that in plaintiffs' view directly contravenes Congress' aim."). Therefore, because the *Catholic Conference* plaintiffs "did not impugn Congress's exercise of its taxing and spending powers, their status as federal taxpayers was insufficiently linked to their claim," and the court concluded they lacked standing. *Id.* The federal taxpayers in *Lamont*, by contrast, challenged allegedly unconstitutional expenditures by the Executive Branch that were "permitted, but . . . not mandate[d]" by the appropriations statute. *Lamont*, 948 F.2d at 830 n.2. Thus those plaintiffs "fit[] the traditional *Flast* model of taxpayer standing." Pet. Reply 9 n.4.

Although *Catholic Conference* appears to depart from *Flast*, *see Flast*, 392 U.S. at 90, 109 (finding standing without distinguishing between plaintiffs' claims that the funds were used improperly under the act and, in the alternative, that the act was unconstitutional to the extent it permitted such use), it turns on an issue not presented by the case before the Court because the plaintiffs here have made no allegation that the Executive's use of appropriated funds contravened congressional funding statutes. Where, as here, plaintiffs challenge Executive Branch expenditures that are consistent with the appropriations statute, they have demonstrated a nexus with the tax and spend power and thus have standing to bring an Establishment Clause claim. *Kendrick*, 487 U.S. at 619-620; *see also Lamont*, 948 F.2d at 843.

III. Settled Principles of Stare Decisis Bar Overruling *Flast*

Those seeking to overturn *Flast* bear a "heavy burden." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986). Stare decisis

"contributes to the integrity of our constitutional system of government." *Id.* at 265. It "carries such persuasive force" that this Court has "always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). No such justification exists here.

This Court has looked to four factors to help guide its decision about whether an earlier case should be overturned: (1) whether the development of the law has left the original decision "no more than a remnant of abandoned doctrine"; (2) whether the understanding of the factual premise for the earlier decision has so changed "as to have robbed the old rule of significant application or justification"; (3) whether the rule is unworkable; and (4) whether reversal would cause harm to or inflict inequity on those who have relied on it. *Planned Parenthood of S.E. Penn.* v. *Casey*, 505 U.S. 833, 854-855 (1992). This assessment strongly supports upholding *Flast*.

"Intervening development of the law" is the "primary reason" for this Court's reversals. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). As explained above, *Flast* was—and is—consistent with traditional principles of standing, and it was reaffirmed by this Court as recently as last Term. *See DaimlerChrysler*, 126 S. Ct. at 1861. Recent standing cases cannot be said to have "removed or weakened the conceptual underpinnings" from *Flast* or to have "rendered [*Flast*] irreconcilable with competing legal doctrines or policies." *Patterson*, 491 U.S. at 173; *see also Mitchell* v. *United States*, 526 U.S. 314, 331-332 (1999) (Scalia, J., dissenting, noting that "wide acceptance in the legal culture" would be an "adequate reason" not to overrule precedent). *See supra* Parts I.A and I.B.

This Court has also overturned precedent when the factual premise underlying the older case has been found to be invalid. *See Casey*, 505 U.S. at 864 (explaining that *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), and *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), were valid departures from principles of stare decisis because "each rested on facts,

or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions"). But the factual basis for *Flast* remains valid today. Indeed, when this Court reaffirmed *Flast*'s legal conclusion, it also reaffirmed the factual premise on which that conclusion was based: the understanding that the Establishment Clause was designed to address the specific concern "'that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 103). Thus, *Flast*'s holding is not "somehow irrelevant or unjustifiable in dealing with the issue it addressed." *Casey*, 505 U.S. at 855.

Nor has *Flast* "proven to be intolerable simply by defying practical workability." *See Casey*, 505 U.S. at 854. As discussed above, the lower courts have faced no particular difficulty in assessing taxpayer standing questions in Establishment Clause cases, and "the required determinations fall within judicial competence." *Id.* at 855. *See supra* Part II.B.1. *Flast* provides a clear, administrable, and narrow rule that recognizes the Establishment Clause's unique yet important role while guarding against widespread reliance on taxpayer standing. It has presented no problems that would support its overruling. *Compare Swift & Co.* v. *Wickham*, 382 U.S. 111, 115-116 (1965) (finding an earlier decision unworkable where this Court found its application "as elusive as did the District Court").

This Court has recognized that the reliance interests that support stare decisis are not limited to cases involving economic reliance. *See Casey*, 505 U.S. at 855-856. Indeed, stare decisis is "even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements." *Payne* v. *Tennessee*, 501 U.S. 808 852-853 (1991) (Marshall, J., dissenting). Individuals seeking to challenge the will of the majority on constitutional grounds—including those claiming that elected representatives have used taxpayer funds to support the establishment of religion—have a strong interest in ensuring that this

Court's decisions do not shift with changes in popular sentiment. *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); *see also Casey*, 505 U.S. at 868 ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.").

Where, as here, Petitioners and supporting amici have "offered no reason to believe that any . . . metamorphosis has rendered the Court's long commitment to [*Flast*] outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration," *Vasquez*, 474 U.S. at 266, there is no ground for overturning a precedent that has withstood the test of almost forty years of consistent and workable application.

CONCLUSION

For the foregoing reasons, amici respectfully request that the decision of the United State Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted.

STEVEN R. SHAPIRO
DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, N.Y. 10004
(212) 549-2500

AYESHA N. KHAN
RICHARD B. KATSKEE
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

K. HOLLYN HOLLMAN
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY
200 Maryland Avenue, N.E.
Washington, D.C. 20002-5797
(202) 544-4226

ANNE HARKAVY
Counsel of Record
KELLEY BROOKE SNYDER
CAROLINE ROGUS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

HOWARD W. GOLDSTEIN
STEVEN M. FREEMAN
STEVEN C. SHEINBERG
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, N.Y. 10158-3560
(212) 885-7743

FEBRUARY 2007

368 e

No. 06-157

IN THE

Supreme Court of the United States

JAY HEIN, Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

JEFFREY SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022-2746
(212) 751-4000

MARC D. STERN
Counsel of Record
American Jewish Congress
825 Third Avenue, 18th Fl.
New York, NY 10022-7519
(212) 360-1545
mstern@ajcongress.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... *iii*

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. The Distinction Between Legislative And Executive Spending Is Wholly Illogical 5

B. The Founders Were Concerned With All Official Religion, Not Legislatively Established Religion 8

1. The Memorial and Remonstrance Opposed All Governmental, Not Just Legislative, Establishments 8

2. Early State Constitutional Provisions Likewise Drew No Distinction Between Legislative And Executive Establishments 12

II. NO STATE HAS ADOPTED ANY OF THE RESPONDENTS' LIMITS ON TAXPAYER SUITS 14

A. Ordinary State Taxpayer Suits Are Not Governed By Petitioners' Rules 14

B. State Taxpayer Suits Challenging Government Funding Of Religion Are Likewise Not Governed By Petitioners' Rules 19

III. PETITIONERS' SEPARATION OF POWERS ARGUMENT ASSUMES AN EXECUTIVE MORE EQUAL THAN OTHER BRANCHES, NOT CO-EQUAL BRANCHES 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 421 U.S. 203 (1997) 6

Alliance Affordable Energy v. Council, 677 So. 424 (1996) 15, 18

Americans United v. Kent County, 97 Mich.App. 72, 293 N.W.2d 723 (1980) 20

Atchison, T. & S.F.R. Co. v. City of Atchison, 28 P. 1000 (Kan. 1928) 19

Blevins v. Bd. of Douglas County Comm'rs, 251 Kan. 374, 834 P.2d 1344 (1992) 15

Board of Ed. of Cincinnati v. Minor, 23 Ohio St. 211 (Ohio 1872) 19

Borden v. La. Bd. of Educ., 168 La. 1005, 123 So. 655 (1929), aff'd *sub nom*, *Cochran v. Bd. of Educ.*, 281 U.S. 370 (1930) 21

Boryzewski v. Brynes, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975) 16

Bowen v. Kendrick, 487 U.S. 489 (1988) ..... *passim*

Chance v. Miss. Textbook Bd., 190 Miss. 453, 200 So.2d 706 (1941) 21

Church v. Bullock, 104 Tex. 1, 135 S.W. 115 (1908) 19

Citizens v. City of Shenandoah, 686 N.W.2d 470 (Ia. 2004) 15

Citizens Committee v. County Comm'r, 233 Md. 398, 197 A.2d 108 (1964) 14

City of Appelton v. Town of Menasha, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) 16

City of Wilmington v. Land, 378 A.2d 635 (Del. 1977) 15

Clinton v. Jones, 520 U.S. 681, 699 (1997) 22

Collins v. Martin, 302 Pa. 144, 153 A.13 (1931) 20

Common Cause v. State, 455 A.2d 1 (Me. 1983) .....

County of Allegheny v. ACLU, 492 U.S. 573 (1992) 11

Cunningham v. Exon, 202 Neb. 563, 276 N.W.2d 213 (1979) 16

Daimler-Chrysler v. Cuno, ___ U.S. ___, 126 S.Ct. 1854 (2006) 22

Doremus v. Bd. of Education, 342 U.S. 429 (1952) ..... *passim*

E. Mo. Laborers v. St. Louis County, 781 S.W.2d 43 (Mo. banc 1989) 15

Egbert v. Dunseith, 74 N.D. 1, 24 N.W.2d 907 (1946) 16

Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003) 15

Engel v. Vitale, 370 U.S. 421 (1962) 11

Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948) 15

Everson v. Bd. of Education, 330 U.S. 1 (1947) 8, 9

Fisher v. Clack. School Dist., 13 Or. App. 56, 507 P.2d 839 (1973) 21

Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*

Fox v. City and County of Los Angeles, 22 Cal.Rptr 792, 587 P.2d 663, 150 Cal.Rptr. 867 (1978) 20

Gerhardt v. Reid, 66 N.D. 444, 267 N.W. 127 (1936) 21

Goldman v. Landsidle, 262 Va. 364, 552 S.E.2d 67 (2001) 14

Goldston and Hurrington v. State, ___ N.C. App. ___, ___ S.E.2d ___ (N.C. 2006) 16

Gordon v. Bd. of Educ., 78 Cal.App.2d 464, 178 P.2d 488 (1947) 19

Grinnell v. State, 121 N.H. 823, 435 A.2d 523 (1981) 16

Hard v. DePaoli, 56 Nev. 19, 41 P.2d 1054 (1935) 16

Harfst v. Hoegen, 349 Mo. 808,162 S.W.2d 609 (Mo. banc 1942) 21

Highgate Condominium Ass'n v. Watertown Fire Dist., 210 Ct. 6, 533 A.2d 1126 (1989) 15

Horace Mann League v. Board, 242 Md. 645, 220 A.2d 51 (1966) 20

Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362 (1970), aff'd, 413 U.S. 734 (1973) 20

INS v. Chadha, 462 U.S. 919 (1983) 23

Iuli v. Fasi, 62 Haw. 180, 613 P.2d 653 (1980) 15

Jordan v. Siegelman, ___ Ala. ___, ___ So.2d ___ (2006) 15

Kaplan v. Independent School Dist. of Virginia, 171 Minn. 142, 214 N.W. 18 (1927) 20

Lemon v. Kurtzman, 403 U.S. 621 (1971) 21

Lipscomb v. State Bd. of Higher Educ., 305 Or. 472, 753 P.2d 939 (1987) 16

Locke v. Davey, 540 U.S. 712 (2004) 8, 12

Mandel v. Hodges, 54 Cal.App.3d 596, 127 Cal.Rptr. 244, 293 N.W.2d 723 (1976) 20

Marsh v. Chambers, 463 U.S. 783 (1983) 11

Massachusetts v. Mellon, 267 U.S. 447 (1923) .....

Matter of Abrams (NYCTA), 39 N.Y.2d 990, 355 N.E.2d 289, 387 N.Y.S.2d 235 (1976) .....

McDaniel v. Paty, 435 U.S. 618 (1978) .....

MEA v. Superintendent, 272 Mich. App. 1, 724 N.W.2d 478 (2006) .....

Mikell v. Town of Williston, 129 Vt. 586, 285 A.2d 713 (1971) .....

Mueller v. Allen, 463 U.S. 388 (1983) .....

Murray v. Comptroller, 241 Md. 383, 216 A.2d 897 (1966) .....

Nance v. Johnson, 84 Tex. 401, 19 S.W. 559 (Tex. 1892) .....

Nicholl v. E-470 Public Highway Authority, 896 P.2d 859 (Colo. 1995) .....

NY Times v. Sullivan, 376 U.S. 254 (1964) 12

Olson v. Salt Lake City School Dist., 724 P.2d 960 (1986) 16

Parker v. Youngquist, 69 S.D. 423, 11 N.W.2d 84 (1943) 16

Parks v. Alexander, 608 S.W.2d 881 (Tn. Ct. Apps. 1980) 16

People ex rel Bernat v. Bicék, 405 Ill. 510, 91 N.E.2d 588 (1950) 21

Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 888 A.2d 655 (2005) 14

Pratt v. Az. Bd. of Regents, 110 Az. 466, 520 P.2d 514 (1974) 21

Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956). 21

Resnick v. E. Brunswick Twshp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) 21

Rudd v. Ray, 248 N.W.2d 125 (Ia. 1976) 20

Schade v. Allegeny County Inst. Dist., 386 Pa. 507, 126 A.2d 911 (1956) ..... *passim*

School Bd. of Volusia County v. Clayton, 691 So.2d 1066 (Fla. 1997) 15

Scott v. Buhl J.S.D., 123 Id. 779, 852 P.2d 1376 (1993) 14

Shrum v. City of Cowetta, 449 F.3d 1132 (10th Cir. 2006) 7

Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) 16, 17

State ex rel v. Racing Comm'n, 162 Ohio Stat. 366, 123 N.E.2d 1 (1954) 16

State ex rel Carter v. N. Olmstead, 69 Ohio Stat.3d 315, 631 N.E.2d 1048 (1994) 16

State ex rel Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995) 14

State ex rel Kane v. Goldschmidt, 308 Or. 573, 783 P.2d 988 (1990) 16

State ex rel Warren v. Reuter, 44 Wis.2d 201, 170 N.W.2d 790 (1969) 20

State ex rel Weiss v. District Board of School Dist. No. 8 of City of Edgerton, 76 Wis. 177, 44 N.W. 967 (Wis. 1890) 19

State v. Scheve, 65 Neb. 853, 91 N.W. 846 (Neb. 1902) 19

Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998) 3, 11

Swart v. South Burlington, 122 Vt. 177, 157 A.2d 514 (1961) 16

Tattersall v. Yelle, 52 Wn.2d 856, 329 P.2d 841 (1958) 16

Trustees v. State, 736 P.2d 324 (Alk. 1987) 15

Tudor v. Bd. of Education, 14 N.J. 31, 100 A.2d 857 (1953) 20

Valley Forge College v. Americans United, 454 U.S. 464 (1982) 22

Walker v. Munro, 124 Wn.2d 402, 879 P.2d 920 (1994) 16

Widmar v. Vincent, 454 U.S. 263 (1981) 7

Williams v. Lara, 52 S.W.3d 171 (Tex. 2001) 20, 21

Winkler v. W. Va. School Bldg. Authority, 189 W.Va. 748, 434 S.E.2d 420 (1993) 16

Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004) 12

Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951) 21

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 7

CONSTITUTIONS, STATUTES, LEGISLATIVE MATERIALS

1776 Constitution of North Carolina, 5 Founders' Constitution at 71 (Document 30) 13

1776 Constitution of New Jersey, 5 Founders' Constitution at 71 (Document 28) 13

1776 Constitution of Pennsylvania, 5 Founders' Constitution at 75 (Document 35) 13

1777 Constitution of Vermont, 5 Founders' Constitution at 71 (Document 30) 13

1777 New York Constitution, 5 Founders' Constitution at 75 (Document 35) 13

Article I, § 8 8-9

Cal. Code Civ. Pro. § 526a 15

Consolidated Appropriations Act, FY 2005, P.L. 108-477, § 208 7

Delaware Declaration of Rights and Fundamental Rules, 5 Founders' Constitution at 70 (Document 26) 13

Ill. Cons. Stat. 5/11-301 15

Kan. Stat. 60-907(b) 15

Mich. Cons. Laws § 600.2041(3) 15

Or. Stat. § 294.100(2) 15

OTHER AUTHORITIES

Continental Congress, Address to the Inhabitants of the Province of Quebec, 5 Founders' Constitution at 61 (1774) (Document 19) 13

Johnson, Samuel, Dictionary of the English Language (1792) 10

Locke, A Letter Concerning Toleration, reprinted in 5 Founders' Constitution at 52 (Document 24) 10

Letter of T. Jefferson to Rev. S. Miller, 5 Founders' Constitution at 98 (Document 60) (1808) 12

Madison, J., Detached Memoranda, 5 Founders' Constitution at 103 (Document 64) (1817) 12

Madison, J., Memorial and Remonstrance Against Religious Assessment.....*passim*

Letter of J. Madison to E. Livingston, 5 Founders' Constitution at 98 (Document 66).....12

Pratt, J.W., Religion, Politics and Diversity: The Church-State Theme in New York History (1967), 49-80.....12

BRIEF OF THE AMERICAN JEWISH CONGRESS and THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Because those rights of Jews are dependent on a government that is scrupulously neutral about religion, AJCongress devoted much energy to litigation enforcing the Establishment Clause. Indeed, the case on which this one turns, *Flast v. Cohen*, 392 U.S. 83 (1968) was litigated by AJCongress' Special Counsel, Leo Pfeffer.

* * *

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters and 32 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to defending the religious rights and freedoms of all Americans. A staunch supporter of church-state separation as the surest guarantor of religious liberty, AJC filed an *amicus* brief in *Flast v. Cohen*, arguing that permitting taxpayers to initiate lawsuits is necessary to give effect to the Establishment Clause. AJC files again in this cased based on the belief that government funds, irrespective of whether they bear the stamp of congressional earmark, should not be used to promote religion and that, in order to vindicate the First Amendment, taxpaying Americans must be given the opportunity to challenge such unconstitutional expenditures in the courts.

The brief is filed with the consent of the parties. Letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. Petitioners' case for reversal rests on three principles they say are intrinsic to *Flast v.Cohen*, 392 U.S. 83 (1968): expenditures initiated by the Executive Branch are distinct from the congressional decision to allocate money to the Executive Branch, and are not traceable to Congress' spending power; only legislative expenditures in support of religion were of concern to the Founders; and, even as to legislative spending, standing under *Flast* exists only when government gives money to non-governmental actors, not when it itself engages in religious advocacy.

2. Nothing in *Flast* or its progeny lends support to these claims. Nor does logic support any of these distinctions. Whether by executive or legislative decision making, funds expended on religion cause exactly the same constitutional harm to the taxpayer.

3. Petitioners offer no explanation—and we can think of none—why taxpayers have standing to challenge grants to groups using religion to advocate abstinence (*Bowen v. Kendrick*, 4887 U.S. 489 (1988), but not to challenge identical programs operated directly by government, especially since as a matter of substantive constitutional law, the latter is more problematic than the former.

4. The claim that the Founders were concerned only with legislative appropriations for religion lacks historical basis. A review of the legal materials from the Founding era demonstrates a focus on prohibiting certain outcomes (using governmental power to advance religion, in particular

through funds extracted from taxpayers), not with allocating to one branch the power to spend money to advance religion. This is true both as to the influential Memorial and Remonstrance and as to early state constitutions in those states committed to a no-aid principle. Thus, for example, the Memorial speaks of the evils of the civil magistrate aiding religion. There 'magistrate' meant, as Samuel Johnson defined it, a person "publickly invested with authority; as a governour." (John Locke makes similar arguments using the word 'magistrate,' and he, too, included the executive within the proscription of government aid to religion.)

5. Various early state constitutions also did not limit the ban on financial aid to religion to legislatures, focusing instead on the right of citizens not to fund religion through government spending. New York, for example, warned of danger posed by both "wicked priests and princes" in seeking to financially aid religion.

7. Petitioners' recitation of numerous instances in which members of the Executive Branch have over the years made religious statements proves little. This test confuses the question of whether plaintiffs should prevail on the merits with the distant question of whether they have standing, *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998). In any event, those utterances, which may not be of the same quality with what is alleged here, did not pass unchallenged by the likes of Madison and Jefferson.

8. A restriction on taxpayer suits to either legislative expenditures or those made to groups outside government finds no support in the practice in state taxpayer suits generally, or those challenging government aid to religion specifically. They were created *ex nihilo* for this case. There

are other restrictions on such suits found in the state case law—the need to show special harm or to notify a specified official (the Attorney General) before filing suit; distinctions between negative and affirmative relief; or the exclusion of discretionary matters from the scope of the remedy. There is, however, no sign at all of any of the novel restrictions suggested by Petitioners.

9. The specter conjured up by Petitioners that if their proffered limits are not grafted unto *Flast* the Executive Branch will be barraged with taxpayer suits is not supported by the evidence from the states which permit taxpayer suits without Petitioners' limits, and are not buried in litigation. Parades of imagined horribles ought to be unpersuasive in the face of longstanding contrary experience.

10. Contemporary standing doctrine rests largely on preserving the separation of powers between branches. Separation of powers presumes three "co-equal branches" of government. Petitioners' arguments, particularly their argument that executive expenditures are not subject to taxpayer suits, suggest that the executive is substantially more equal than the legislature or the judiciary.

ARGUMENT[1]

Petitioners' core claim is not that Plaintiffs failed to allege the "pocketbook injury" required by *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952) and *Flast v. Cohen*, 392 U.S. 83 (1968). Instead, they assert that "when Congress provides

---

[1] No person or entity, other than the *Amici Curiae*, their members and their counsel, made a monetary contribution to the preparation and submission of this brief. Counsel for the Respondents did not prepare this brief, either in whole or in part.

funds to the executive branch to be used in the Executive's discretion and outside of a specific congressionally ordained spending program, Congress' taxing and spending role ends when those funds are appropriated—that is, when the funds are delivered into the control of the Executive Branch." Petitioners' Brief ("Pet. Brief") at 30. *Flast*, they continue, applies only to congressional exercises of spending power, not executive expenditures. Pet. Brief at 24-26.[2]

To buttress their novel claim, Petitioners postulate that only legislative expenditures in support of religion concerned the Founders, Pet. Brief at 36. As a corollary, they add that even with regard to legislative spending, *Flast* standing exists only where funds are expended outside government. Pet. Brief at 38-44.

Petitioners' reading of *Flast* (to borrow terms from philosophy), confuses accidents with properties, and wrenches the First Amendment from its historical matrix. The restrictions Petitioners draw from in *Flast* and its direct descendant, *Bowen v. Kendrick*, 487 U.S. 489 (1988), are not in fact found in those cases. They were created *ex nihilo* for this one

A. The Distinction Between Legislative And Executive Spending Is Wholly Illogical

Petitioners' submission amounts to this: if the executive branch responds to a congressional command to address teenage pregnancy by making non-earmarked grants to third

---

[2] As the Center for Inquiry's *amicus* brief demonstrates, Petitioners' argument simultaneously misinterprets the way Congress appropriates money to the executive branch and creates an until now unheard of executive spending power.

parties,[3] taxpayers have standing to challenge particular grants as establishing religion, *Bowen v. Kendrick*, *supra*. If, on the other hand, the executive branch decides on its own to use funds committed by Congress to its unfettered discretion to set up an office to conduct identical programs as its own to combat teenage pregnancy, there would be no taxpayer standing.

Of the raw illogic of Petitioners' reading of *Flast* and *Bowen*, there is no need to say much. Whether by congressional or executive decision, the result is the same: funds (the proverbial "three pence") are pried from taxpayers to propagate religious views, a harm at the core of the Establishment Clause. That injury is the same no matter which branch of government spends money for that forbidden purpose.

If, as *Bowen* holds, standing exists to challenge a legislatively ordained abstinence program, even when the executive branch decides which groups are funded, what possible justification is there to allow the executive to conduct an identical program free of judicial challenge initiated by the same taxpayer complaining of the same harm to his pocketbook?

---

[3] Throughout, Petitioners' refer to grants to third parties. They do not specify whether these third parties encompass only non-governmental groups or include grants to other governmental units, and whether their theory would recognize taxpayer standing if the other governmental unit in turn made sub-grants to non-governmental groups. *Flast* itself involved grants to another governmental unit expended by that government itself allegedly in aid of religion. Cf. *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding program at issue in *Flast* in part on the basis that funds remained under public control).

Petitioners pointedly do not claim that, despite its wording ("Congress shall make ..."), the Establishment Clause applies only to the legislature. Cf. *Shrum v. City of Cowetta*, 449 F.3d 1132 (10th Cir. 2006) (rejecting argument that constraints of the First Amendment inapplicable to executive). They insist only that taxpayer standing is to be inexplicably bifurcated: it follows the constitutional harm in the case of legislative, but not executive, expenditures.

The judiciary's authority as a co-equal branch of government would be decidedly undermined if, in response *Bowen*, executive branch officials had, with impunity from taxpayer suit, taken a general appropriation for the operation of the Executive Office of the President (or took advantage of authority granted by Congress to shift funds from one departmental account to another[4]) to continue the very program the court had just held unconstitutional.

Petitioners offer no explanation and no authority for their further claim that the Establishment Clause harm to taxpayers of subsidizing nongovernmental groups is greater than the harm of the government undertaking such a program on its own. As a matter of substantive constitutional law, the harm is undoubtedly greater in the latter case than the former. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) with *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1981); *Mueller v. Allen* 463 U.S. 388, 399 (1983).

Flast, it is true, involved subsidizing a third party to provide a direct service to parochial school students. *Bowen* involved grant-making to third parties. But as Respondents

---

[4] See, e.g., Consolidated Appropriations Act for FY 2005, P.L. 108-447, § 208.

and other of their *amici* argue, not a single word in the *Flast* or *Bowen* opinions suggests that anything turns on that happenstance, or that the result would have been different had the federal government itself undertaken to conduct remedial instruction in parochial schools or offer abstinence education. The happenstance that third parties were involved is no more significant for future cases than the fact that *Flast* arose in New York and *Bowen* involved sex.

B. The Founders Were Concerned With All Official Religion, Not Just Legislatively Established Religion

1. The Memorial and Remonstrance Opposed All Governmental, Not Just Legislative, Establishments

Petitioners' contend that the particular concern of the Framers was that the legislature (but not the executive) would transfer funds from taxpayers into the coffers of churches, Pet. Brief at 41. An attached footnote, *id.*, at n. 14, cites *Locke v. Davey*, 540 U.S. 712, 722 (2004); *Flast*, 392 U.S. at 103-04; and *Everson v. Bd. of Education*, 330 U.S. 1, 11 (1947), in support of this proposition. While each emphasizes the Founders' concern with legislative enactments funding religion, none even suggests that only congressional expenditures were proscribed (much less are sufficient to create taxpayer standing) and that religious subsidies were of concern only when channeled through private hands.

Of course, when discussing the spending power, the Founders spoke of legislative action, since they charged only that body with laying taxes and spending money. Article I, §

8. It does not follow that such spending was the Founders' exclusive concern.

Petitioners' reading of Madison's Memorial and Remonstrance Against Religious Assessment ("Memorial"),[5] as focusing exclusively on legislative activity to pay outsiders to teach religion is textually unsustainable. Pet. Brief at 41. Of course, the Memorial mentions the Virginia legislature. That body, not Virginia's governor or its judiciary, was considering the bill Madison was addressing. But a close reading demonstrates that he had broader concerns than legislative excess in mind.

The very first argument mustered by the Memorial is that "religion or the duty we owe our Creator ... and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Madison goes on to speak of "civil society['s]" incompetence in matters of religion, "which is wholly exempt from [civil society's] cognizance," because duties to God precede the formation of civil society. This argument is as applicable to executive appropriations in support of religion as to legislative ones. It is all of the civil authority that is debarred from interfering with the prior duty to God, not one or the other of its constituent parts. Duties owed God are not constrained by Montesquieu's theory of separate branches of government.

In the next paragraph (¶ 2), Madison refers to the legislative body as a "vice regent" of society as a whole. He goes on, however, to speak interchangeably of restrictions on "free government," including its "co-ordinate departments,"

---

[5] All textual references are to the Memorial as reprinted in an Appendix to *Everson v. Bd. of Educ.*, 330 U.S. 1, 63 (1947).

"more especially that neither of them be suffered to overlap the great Barrier which defends the rights of the people" (emphasis added).

Petitioners likewise demonstrate no basis upon which to limit the critical reference in the next paragraph (¶ 3) to "the same authority which can establish Christianity ... may establish ... any particular sect of Christianity" only to the legislature.

Paragraph 5 of the Memorial refers to the incompetence of the "Civil Magistrate" as a judge of religious truth. Later in the same paragraph, Madison rails against "Rulers in all ages" who have violated this principle. Both "magistrate" and "ruler" are terms at least as likely to refer to the executive as the legislature. Samuel Johnson's authoritative Dictionary of the English Language (1792) defined a magistrate as "a man publickly invested with authority; a governour"—in short a person invested with executive authority.

We note, parenthetically, that John Locke, in his influential A Letter Concerning Toleration, reprinted in P. Kurlander and R. Lerner (ed.), 5 Founders' Constitution 52 (Document 24) (1987) ("Founders' Constitution"), when setting limits on governmental interference with religion likewise uses the word 'magistrate' to apply to all branches of government. He goes on to say that "no man can so far abandon the case of his own salvation ... to leave the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace" (emphasis added).

Paragraphs 6 and 7 of the Memorial argue that Christianity "disavows a dependence on the powers of this World" and was dishonored by fourteen centuries of reliance

on civil authority. This reference to the "civil authority" cannot refer only to legislatures. For most of the referenced period, there were no legislatures, certainly not legislatures as powerful as executives (kings).

Given that the relevant background for the American religious settlement was the English religious conflicts of the prior century and a half, wars that were alternately (or sometimes jointly) the product of both executive and legislative branch overreaching, *cf. Engel v. Vitale*, 370 U.S. 421 (1962), it would be nothing short of astounding had Madison discounted concerns about the executive branch.

The salience of this history is not undermined by instances in the Founding era and later when members of the Executive Branch made overtly religious statements. Pet. Brief at 38-41. Those instances show at most that some of what Respondents have challenged may be within the bounds of substantive constitutional law. Petitioners do not show, as they must, that there is no set of circumstances in which Executive Branch officials could violate the Establishment Clause by endorsing religion, such that there is no conceivable injury for which Respondents could seek redress. A failure to prevail on the merits does not mean the absence of a case or controversy. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) (collecting cases).

A similar history of religious statements has been marshaled for the legislative branch, *Marsh v. Chambers*, 463 U.S. 783 (1983). That does not mean that no claim could be advanced against any legislative religious invocations. The contrary is authoritatively established, *County of Allegheny v. ACLU*, 492 U.S. 573, 603-05 (1992); *Wynne v.*

Town of Great Falls, 376 F.3d 292 (4th Cir. 2004). Petitioners again do not account for the preference they afford executive expression of religious sentiments.

Just as the Alien and Sedition laws are not an authoritative gloss on the First Amendment's Free Speech Clause, *NY Times v. Sullivan*, 376 U.S. 254 (1964), so, too, one should not accept without more detailed examination the constitutionality of any statement government officials have ever made in support of religion. Jefferson and Madison did not. See Letter of T. Jefferson to Rev. S. Miller, 5 Founders' Constitution 98 (Document 60) (1808); J. Madison, Detached Memoranda (1817); *id.*, at 103-05 (Document 64); Letter to E. Livingston (182), *id.*, at 105 (Document 66) (complaining of Executive Proclamations pronouncing public fasts and days of Thanksgiving).

2. Early State Constitutional Provisions Likewise Drew No Distinction Between Legislative And Executive Establishment

The struggle against religious assessments in Virginia has played a special role in interpreting the First Amendment. *Locke v. Davey*, 504 U.S. 712, 722 (2004). By the time of the founding other states, too, had banned compulsory support for religion, and their documents, too, are inconsistent with Petitioners' arguments. Like the Memorial, they express broader concerns than just legislative excess.

In New York, the colonials' struggle for non-establishment focused on a governor's efforts (supported by the legislature) to establish the Episcopal Church, J.W. Pratt, Religion, Politics and Diversity: The Church-State Theme in New York History (1967), 49-80. The Continental Congress,

in its Address to the Inhabitants of the Province of Quebec, 5 Founders' Constitution at 61-63, spoke of religious liberty being denied by the royal governor and his ministers.

Contemporaneous legal instruments are of a like tenor. These focus on the citizen's right not to be officially compelled to support religion, not on restricting only the legislature's ability to compel and allocate religious subsidies. The Delaware Declaration of Rights and Fundamental Rules (1776) provided that "no Man ought or of Right can be compelled to ... maintain any Ministry contrary to his free Will and Reason and that no Authority can be vested in or assumed by any Power whatever [to]... control the Right of Conscience ..." 5 Founders' Constitution at 70 (Document 26).

New Jersey (1776) provided that "no person ... be compelled to attend any place of worship; nor shall any person ever be obliged to pay tithes, taxes, or any other rates for the purpose of building ... any other church," *id.*, at 71 (Document 28). Similar citizen-right focused language can be found in the 1776 North Carolina and Pennsylvania Constitutions, and the 1777 Vermont Constitution, *id.*, at 71, Document 29 and *id.* at 71, Document 30; *id.*, at 75, Document 35.

New York (1777) prefaced its religious liberty provision by adverting to the "bigotry and ambition of weak and wicked priests and princes ...," not legislators, *id.*, at 75, Document 34.[6]

---

[6] North Carolina, New York and South Carolina barred clergymen from serving in both the legislative and executive branches. See *McDaniel v. Paty*, 435 U.S. 618 (1978). If there were only a fear of establishments by

II. NO STATE HAS ADOPTED ANY OF THE RESPONDENTS' LIMITS ON TAXPAYER SUITS

A. Ordinary State Taxpayer Suits Are Not Governed By Petitioners' Rules

If neither logic nor history sustains Petitioners' proffered limitations on *Flast* taxpayer suits, neither does the actual practice in state taxpayer suits. None of Petitioners' proffered proposals for circumscribing *Flast* can be found in numerous reported state taxpayer actions.

Almost all states have allowed taxpayer suits against municipalities at least since *Massachusetts v. Mellon*, 267 U.S. 447 (1923). A few states reject state taxpayer standing, but even those often leave the courthouse doors open to some such suits.[7] Most do allow them against state government, see *infra*, n. 9.

---

the legislative branch, these provisions designed to prevent a re-establishment of religion would have been limited to service in the legislature.

[7] Suits refusing to recognize taxpayer standing include *Scott v. Buhl J.S.D.*, 123 Id. 779, 852 P.2d 1376 (1993); *Citizens Committee v. County Comm'r*, 233 Md. 398, 197 A.2d 108 (1964) (no taxpayer standing, but standing where suit raises constitutional issue of great public interest); *State ex rel Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) (no taxpayer standing; court nevertheless asserted jurisdiction because of "great public interest"); *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005) (no taxpayer standing absent special harm, unless (1) government action otherwise would go unchallenged, (2) those directly affected have no incentive to challenge expenditure, (3) judicial relief is appropriate; (4) no other redress exists and (5) no better situated plaintiff exists; *Goldman v. Landsidle*, 262 Va. 364, 552 S.E.2d 67 (2001) (no taxpayer standing absent special injury "pecuniary or otherwise"). Virginia does allow

In some cases, taxpayer standing is a matter of statutory right;[8] in most others, it is a creation of judicial decision.[9] A

---

municipal taxpayer suits without Petitioners' proposed limitations, *Goldman, supra.*

[8] See, e.g., Cal. Code Civ. Pro. § 526a; Mich. Cons. Laws § 600.2041(3); Ill. Cons. Stat. 5/11-301; Kan. Stat. 60-907(b); Or. Stat. § 294.100(2). With regard to the constitutionality of the broadest reaches of Michigan's law, see *MEA v. Superintendent*, 272 Mich. App. 1, 724 N.W.2d 478 (2006). None of these statutes incorporate Petitioners' proposed limits on taxpayer standing.

[9] See, e.g., *Jordan v. Siegelman*, ___ Ala. ___, ___ So.2d ___ (2006) ("taxpayer standing to challenge unconstitutional or illegal action"); *Trustees v. State*, 736 P.2d 324 (Alk. 1987) ("illegal government conduct on matter of significant public concern"); *Ethington v. Wright*, 66 Ariz. 382, 189 P.2d 209 (1948) (illegality or waste); *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995) (unlawful expenditures or insuring compliance with state constitution); *Highgate Condominium Ass'n v. Watertown Fire Dist.*, 210 Ct. 6, 533 A.2d 1126 (1989) ("Some pecuniary or other great injury"); *City of Wilmington v. Land*, 378 A.2d 635 (Del. 1977) (unlawful expenditure or misuse of property; no need for special damages); *School Bd. of Volusia County v. Clayton*, 691 So.2d 1066 (Fla. 1997) (taxpayer standing only where special injury or constitutional challenge); *Iuli v. Fasi*, 62 Haw. 180, 613 P.2d 653 (1980) (loss of revenue resulting in increase in plaintiff's or all taxpayers' tax burden); *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003); *Citizens v. City of Shenandoah*, 686 N.W.2d 470 (Ia. 2004) (no taxpayer standing where harm comes from project financed by legally issued bonds, not an illegal expenditure); *Blevins v. Bd. of Douglas County Comm'rs*, 251 Kan. 374, 834 P.2d 1344 (1992) (taxpayer's pocketbook affected); *Alliance Affordable Energy v. Council*, 677 So. 424 (La. 1996) (standing to prevent officials from "transcending their lawful powers or violating their legal duties; drawing distinction between affirmative and negative relief); *Common Cause v. State*, 455 A.2d 1 (Me. 1983) (direct interest in enforcing constitutional provision proscribing use of tax funds for private purposes); *E. Mo. Laborers v. St. Louis County*, 781 S.W.2d 43 (Mo. banc 1989) (illegal expenditure);

review of the relevant statutes and decisions discloses not even a hint of any of the restrictions the government asserts here to restricting taxpayer standing to legislative

---

Cunningham v. Exon, 202 Neb. 563, 276 N.W.2d 213 (1979) (illegality and matter of great public concern; no need for special damages); *Grinnell v. State*, 121 N.H. 823, 435 A.2d 523 (1981) (constitutional challenges); *Boryzewski v. Brynes*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975) (illegal or unconstitutional action); *Hard v. DePaoli*, 56 Nev. 19, 41 P.2d 1054 (1935); *Goldston and Harrington v. State*, ___ S.E.2d ___ (N.C. 2006) (unlawful or unconstitutional government expenditure); *Egbert v. Dunseith*, 74 N.D. 1, 24 N.W.2d 907 (1946) (violation of state constitution); *State ex rel v. Racing Comm'n*, 162 Ohio Stat. 366, 123 N.E.2d 1 (1954) (special damages), but see, *State ex rel Carter v. N. Olmstead*, 69 Ohio Stat.3d 315, 631 N.E.2d 1048 (1994) (allowing mandamus action when taxpayer standing wanting); *State ex rel Kane v. Goldschmidt*, 308 Or. 573, 783 P.2d 988 (1990); *Lipscomb v. State Bd. of Higher Educ.*, 305 Or. 472, 753 P.2d 939 (1987) ("tax burden will be augmented by unlawful expenditures of public funds"); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (public importance of issue, there compliance with state constitution); *Parker v. Youngquist*, 69 S.D. 423, 11 N.W.2d 84 (1943) (illegal act, when attorney general refuses to sue); *Parks v. Alexander*, 608 S.W.2d 881 (Tn. Ct. of Apps. 1980) (need for special harm, but "increased tax burden resulting from wrongful legislative action constitutes such harm" or constitutional violation); *Olson v. Salt Lake City School Dist.*, 724 P.2d 960 (1986) (standing if no more appropriate plaintiff and, if taxpayer suit is disallowed, issue will not be litigated); *Swart v. South Burlington*, 122 Vt. 177, 157 A.2d 514 (1961) (unconstitutional expenditures); *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (no taxpayer standing to challenge tax cuts); *Tattersall v. Yelle*, 52 Wn.2d 856, 329 P.2d 841 (1958) (constitutionality of expenditure); *Winkler v. W. Va. School Bldg. Authority*, 189 W.Va. 748, 434 S.E.2d 420 (1993); *City of Appelton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) (must allege "direct and personal pecuniary loss, different from loss sustained by the general public," or "constitutional issue affecting ... individual rights").

appropriations to be spent by third parties as appropriate restrictions on taxpayer actions.

Taxpayer lawsuits have been allowed to challenge purely executive practices (*i.e.*, a governor holding a simultaneous commission in the U.S. Air Force Reserve in violation of a state constitutional provision barring governor's holding a militia commission) which do not involve any legislative appropriation, *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004)). Other suits have involved legislative programs. Cases involving expenditures do not distinguish between legislative or executive spending decisions, much less between "in-house expenditures" and grants to third parties. While *amici* have obviously not read every state taxpayer standing case, we have read many (including at least one case from every state that recognizes such standing), and have found no indication that any court has ever before thought to impose Petitioners' novel limits on taxpayer suits. Certainly no hard "rule" has emerged to that effect.

The closest thing to an exception—a decision which in the end undercuts Petitioners' position—is *Schade v. Allegeny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956), a challenge to a contract between a state agency and a religious child care agency for care rendered dependent children. Plaintiff taxpayer challenged the reimbursement under a state constitutional provision barring "appropriations" to religious entities.

The state argued that an administrative contract with a sectarian agency was not an "appropriation" within the meaning of the state constitution. The court, however, decisively rejected this substantive claim in terms equally

applicable to Petitioners' standing arguments: "It would be strange, indeed, if the legislature by creating a body politic or corporation to exercise a legislative function could do indirectly what it could not do directly," 386 Pa. at 511.

Petitioners warn that the rejection of their proffered limits on taxpayer standing will lead to overwhelming the executive with taxpayer litigation, Pet. Brief at 47-50. That, however, has not happened in any of the states which have long recognized taxpayer standing in religion and other cases. Neither has recognition of taxpayer standing without Petitioners' proposed restrictions led to government by judiciary. There is no reason to think that the federal executive branch will suffer a different fate. Parades of imagined horribles are unpersuasive in the face of longstanding and widespread contrary experience.

Other limits have in fact been applied in taxpayer cases, as the discussion above demonstrates: the insistence of some courts on special damages; the insistence that complaints first be presented to the Attorney General or other competent official; distinctions between negative and affirmative relief;[10] the exclusion of discretionary matters from the scope of the remedy[11]—each found in the case law and each rationally related to the nature of the taxpayer suit. It is telling and controlling that Petitioners' limits are not among these limits. They should not here and now be grafted onto federal taxpayer suits.

---

[10] *Alliance Affordable Energy, supra*, n. 9.

[11] See *Matter of Abrams* (NYCTA), 39 N.Y.2d 990, 355 N.E.2d 289, 387 N.Y.S.2d 235 (1976).

B. State Taxpayer Suits Challenging Government Funding Of Religion Are Likewise Not Governed By Petitioners' Rules

What is true of taxpayer suits generally is equally true of the numerous taxpayer suits under the Establishment Clause. Such suits have been brought since the 19th century.[12] They have been brought to challenge released time programs,[13] classroom prayer[14], Bible reading,[15] distribution of Gideon

---

[12] In *State v. Scheve*, 65 Neb. 853, 91 N.W. 846 (Neb. 1902), the Supreme Court of Nebraska allowed a suit by a taxpayer challenging the school district's policy of permitting sectarian exercises in violation of the state constitution.

Multiple state supreme courts reached similar results. In *Atchison, T. & S.R.R. Co. v. City of Atchison*, 28 P. 1000, 1001 (Kan. 1928), the court upheld the right of a plaintiff railroad company to challenge a tax to support a religious school.

Likewise, *State ex rel Weiss v. District Board of School Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 968 (Wis. 1890), upheld the right of taxpayers to challenge a school district's policy of allowing teachers to read from the Bible in violation of the state constitutional prohibition on "sectarian instruction" in public schools. See also, *Board of Ed. of Cincinnati v. Minor*, 23 Ohio St. 211 (Ohio 1872) (upholding the suit by taxpayers challenging resolutions that proscribed "religious instruction and the reading of religious books" in Cincinnati public schools as violative of the state constitution); *Nance v. Johnson*, 84 Tex. 401, 404, 19 S.W. 559 (Tex. 1892) (denying taxpayer's petition to enjoin funding a sectarian school for failure to exhaust administrative remedies, but recognizing that "[c]itizens and taxpayers clearly have such interests in the maintenance of nonsectarian public schools and the lawful application of public free school money as entitle them to legal protection").

[13] *Gordon v. Bd. of Educ.*, 78 Cal.App.2d 464, 178 P.2d 488 (1947).

[14] *E.g.*, *Church v. Bullock*, 104 Tex. 1, 135 S.W. 115 (1908).

Bibles in the schools[16] (though, as *Doremus*, *supra*, observes, such practices ordinarily cause no pocketbook injury to taxpayers); prison chaplains;[17] expenditures in aid of religious institutions;[18] lease-lands for churches held by municipalities under colonial charter;[19] development bonds which were not guaranteed by taxpayers;[20] observance of a religious holiday by government pursuant to collective bargaining agreement;[21] lighting city hall in the form of a cross; [22] a wing of a prison set aside for religious indoctrination;[23] and rental of public property for religious

---

15 *Kaplan v. Independent School Dist. of Virginia*, 171 Minn. 142, 214 N.W. 18 (1927).

16 *Tudor v. Bd. of Education*, 14 N.J. 31, 100 A.2d 857 (1953).

17 *Rudd v. Ray*, 248 N.W.2d 125 (Ia. 1976) (legislative appropriations).

18 *E.g.*, *Schade*, *supra*; *Collins v. Martin*, 302 Pa. 144, 153 A.13 (1931) (same).

19 *Mikell v. Town of Williston*, 129 Vt. 586, 285 A.2d 713 (1971); *cf* *Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897 (1966) (statute exempting religious institutions from tax); *State ex rel Warren v. Reuter*, 44 Wis.2d 201, 170 N.W. 790 (1969) (legislative appropriation to religiously affiliated medical school).

20 *Hunt v. McNair*, 255 S.C. 71, 177 S.E.2d 362 (1970), aff'd, 413 U.S. 734 (1973); *Horace Mann League v. Board*, 242 Md. 645, 220 A.2d 51 (1966).

21 *E.g.*, *Americans United v. Kent County*, 97 Mich.App. 72, 293 N.W.2d 720 (1980); *Mandel v. Hodges*, 54 Cal.App.3d 596, 127 Cal.Rptr. 244, 293 N.W.2d 723 (1976).

22 *Fox v. City and County of Los Angeles*, 22 Cal.Rptr. 792, 587 P.2d 663, 150 Cal.Rptr. 867 (1978).

23 *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001).

uses.[24] All of this, of course, is in addition to the aid to parochial school cases beginning with *Lemon v. Kurtzman*, 403 U.S. 621 (1971).

Some cases challenging official aid to religion involved expenditures or actions by government itself,[25] others involved grants to third parties. In some, the government itself was charged with operating a religious school[26] or aiding parochial schools or their students by providing transportation or books.[27] Many fit the Petitioners' legislative model, but others involve decisions by Boards of Education, which are quasi-legislative bodies, and still others, such as *Lara*, *supra*, at n. 23, where a sheriff on his own initiative established a "God-pod" in his jail, were unilateral executive decisions.

The fact that the lines of limitation that Petitioners believe inherent in *Flast* taxpayer standing have not occurred to anyone else in these cases involving religious activity, is

---

[24] *Resnick v. E. Brunswick Twshp. Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978); *Pratt v. Az. Bd. of Regents*, 110 Az. 466, 520 P.2d 514 (1974).

[25] *People ex rel Bernat v. Bicék*, 405 Ill. 510, 91 N.E.2d 588 (1950) (standing judicial order requiring parties in divorce to consult with clergyman).

[26] *Fisher v. Clack. School Dist.*, 13 Or. App. 56, 507 P.2d 839 (1973); *Gerhardt v. Reid*, 66 N.D. 444, 267 N.W. 127 (1936) (public funds paid for public school taught by clergy in former parochial school); *Harfst v. Hoegen*, 349 Mo. 808, 162 S.W.2d 609 (Mo. banc 1942); *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956) (same).

[27] *Chance v. Miss. Textbook Bd.*, 190 Miss. 453, 200 So.2d 706 (1941); *Borden v. La. Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929), aff'd *sub nom*, *Cochran v. Bd. of Educ.*, 291 U.S. 370 (1930).

further evidence that these are neither useful nor relevant restrictions on federal taxpayer suits in religious subsidy cases.

III. Petitioners' Separation Of Powers Argument Assumes An Executive More Equal Than Other Branches, Not Co-Equal Branches

The separation of powers "provides an self-executing safeguard against the encroachment ... of one of the three co-equal branches ... at the expense of another." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (emphasis added). Contemporary standing doctrine emphasizes separation of power concerns and the equality of all three branches *vis-à-vis* one another, *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *Daimler-Chrysler v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854 (2006). Until Petitioners' submission, though, the separation of powers has not been thought to aggrandize one branch over others; it is intended to preserve three *co-equal* branches. Petitioners would grant the executive branch a privileged position *vis-à-vis* the other two.

Separation of powers is not an end unto itself, but one way among many of safeguarding liberty and insuring efficient government. It is not the only relevant principle in determining to which branch a citizen's grievance must be addressed, and it must not be given more than it's due. The power of the courts to police the actions of the other branches where an appropriate case or controversy exists is no less a part of the constitutional scheme than the separation of powers. Judicial review is not a constitutional stepchild;

not an embarrassing uncle whose existence must be denied if possible.

To deny standing here while recognizing it in *Bowen* would mean that the executive branch enjoys an immunity from judicial scrutiny that the legislature does not. It is to preserve a rigid, supposedly originalist, vision of the separation of powers while tolerating an executive of a size, and with powers, which would be unrecognizable to the Founders.

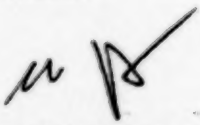
Article III cannot be read as if it did not contain a "cases and controversy" requirement. But where, as here, the text of Article III is not controlling, and a controversy seeking redress of a grievance called into being by the Constitution itself presents itself, the Court should not adopt a rigid reading of one part of the Constitution, and a flexible one of others. *Cf. INS v. Chadha*, 462 U.S. 919, 945 (1983); but see, *id.*, at 977-78 (White, J., dissenting). The result would be a grave distortion of the constitutional structure.

The modern permanent bureaucracy is far less subject to political checks than is Congress. It is not elected every two or six years. Its work is often invisible to the average citizen. Rarely are its decisions sufficiently prominent to generate a political response. The political safeguards which make it difficult for Congress to intrude on the Constitution do not work well to restrain the modern Executive Branch. The taxpayer suit is thus an important check and, at least in the context of the Establishment Clause, one well within the confines of the case and controversy limitation of Article III. It should not be hobbled by Petitioners' imaginative, but artificial, constraints.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,



JEFFREY SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022-2746
(212) 751-4000

MARC D. STERN
Counsel of Record
American Jewish Congress
825 Third Avenue, 18th Floor
New York, NY 10022-7519
(212) 360-1545
mstern@ajcongress.org

FILED
FEB 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-157

In The

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CENTER FOR INQUIRY AND THE COUNCIL FOR SECULAR HUMANISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RONALD A. LINDSAY
CENTER FOR INQUIRY
621 Pennsylvania Ave., S.E.
Washington, DC 20003
(202) 546-2332

IRVIN B. NATHAN
Counsel of Record
DANIEL S. PARISER
SONIA K. PFAFFENROTH
ETHAN P. GREENE
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Amici Curiae

Dated: February 2, 2007

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

I. THE LEGISLATIVE RECORD DEMONSTRATES CONGRESSIONAL INTENT TO FUND THE FAITH-BASED INITIATIVES 3

A. The President's Annual Budgets and Executive Agencies' Budget Documentation Describe and Seek Funding for the Agencies' Implementation of the Faith-Based Initiatives 4

B. Congress Not Only Provided Appropriations in Response to the Repeated Budget Requests, but in Some Cases Explicitly Directed That the Funds Be Used to Administer the Faith-Based Centers 12

II. CONGRESS'S DELIBERATE FUNDING OF THE FAITH-BASED INITIATIVES AND CENTERS ESTABLISHES RESPONDENTS' STANDING UNDER *FLAST* AND *KENDRICK* 15

A. As in *Flast* and *Kendrick*, the Required Nexus Exists Between Respondents' Taxpayer Status and Congressional Funding 15

B. *Flast* and *Kendrick* Do Not Limit Standing Only to Those Instances When Funds Are Disbursed Outside of the Government 22

C. Failure to Find Standing in This Case Would Allow Congress and the Executive to Collaborate to Circumvent the Establishment Clause 24

III. INSULATING THE EXECUTIVE'S USE OF CONGRESSIONALLY APPROPRIATED FUNDS FROM A TAXPAYER'S ESTABLISHMENT CLAUSE CHALLENGE WOULD BE INCONSISTENT WITH THE INTENT OF THE FRAMERS OF THE CONSTITUTION 25

IV. IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THIS CASE DOES NOT RAISE THE QUESTION PRESENTED 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Belcher v. Stengel,
429 U.S. 118 (1976) 29
Bowen v. Kendrick,
487 U.S. 589 (1988) 2, 16, 18, 19, 20
DaimlerChrysler Corp. v. Cuno,
126 S. Ct. 1854 (2006) 15, 16
Doremus v. Bd. of Educ.,
342 U.S. 429 (1952) 21
Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 22, 27
Flast v. Cohen,
392 U.S. 83 (1968) ..... *passim*
Garcia v. United States,
469 U.S. 70 (1984) 17
In re: LTV Aerospace Corp.,
55 Comp. Gen. 307 (1975) 17, 18
Lincoln v. Vigil,
508 U.S. 182 (1993) 18
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,
454 U.S. 464 (1982) 18

Constitutional provisions, statutes and regulations:

U.S. Const. art. I, § 8 ..... 2, 16, 18, 19
U.S. Const. art. III 28, 29
Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004) 12
Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004) 12

Page(s)

Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003) 12, 14
Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2833 (2005) 12
20 U.S.C. § 821 19
Exec. Order No. 13,280, 3 C.F.R. at 262 (2003) 3
Exec. Order No. 13,342, 3 C.F.R. at 180 (2005) 3, 4
Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 7, 2006) 4

Legislative and administrative materials:

H.R. Doc. No. 107-36 (2001) 3
H.R. Rep. No. 93-662 (1973) 17
H.R. Rep. No. 107-342 (2001) (Conf. Rep.) 13
H.R. Rep. No. 108-10 (2003) (Conf. Rep.) 13, 14, 15, 24
H.R. Rep. No. 108-401 (2003) (Conf. Rep.) 15
H.R. Rep. No. 108-792 (2004) (Conf. Rep.) 13
United States Government, *FY 2002 Budget* (2001) *available at* http://www.gpoaccess.gov/usbudget/fy02/browse.html (last visited Jan. 29, 2007) 4, 7
United States Government, *FY 2003 Budget* (2002) *available at* http://www.gpoaccess.gov/usbudget/fy03/browse.html (last visited Jan. 29, 2007) 5, 6, 7
United States Government, *FY 2004 Budget* (2003) *available at* http://www.gpoaccess.gov/usbudget/fy04/browse.html (last visited Jan. 29, 2007) 5, 6, 7
United States Government, *FY 2005 Budget* (2004) *available at* http://www.gpoaccess.gov/usbudget/fy05/browse.html (last visited Jan. 29, 2007) 5, 6, 7

Page(s)

United States Government, *FY 2006 Budget* (2005) *available at* http://www.gpoaccess.gov/usbudget/fy06/browse.html (last visited Jan. 29, 2007) 5, 6, 7

United States Government, *FY 2007 Budget* (2006) *available at* http://www.gpoaccess.gov/usbudget/fy07/browse.html (last visited Jan. 29, 2007) 5, 7

U.S. Government Accountability Office, GAO-06-616, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (2006) *available at* 2006 WL 2007191 ..... 4, 13

U.S. Dep't of Agriculture, *2005 Performance and Accountability Report* (2005), *available at* http://www.ocfo.usda.gov/usdarpt/par2005/pdf/par2005.pdf (last visited Jan. 29, 2007) 9

U.S. Dep't of Agriculture, *2006 Performance and Accountability Report* (2006), *available at* http://www.ocfo.usda.gov/usdarpt/pdf/par2006.pdf (last visited Jan. 29, 2007) 10

U.S. Dep't of Educ., *FY 2005 Budget: Summary and Background Information* (2004), *available at* http://www.ed.gov/about/overview/budget/budget05/summary/05summary.pdf (last visited Jan. 29, 2007) 10

U.S. Dep't of Educ., *FY 2006 Budget: Summary and Background Information* (2005), *available at* http://www.ed.gov/about/overview/budget/budget06/ summary/06summary.pdf (last visited Jan. 29, 2007) 10

Page(s)

U.S. Dep't of Educ., *FY 2007 Budget: Summary and Background Information* (2006), *available at* http://www.ed.gov/about/overview/budget/budget07/summary/07summary.pdf (last visited Jan. 29, 2007) 10, 11

U.S. Dep't of Education, *Overview: Budget Process in the U.S. Department of Education, available at* http://www.ed.gov/about/overview/ budget/process.html (last visited Jan. 29, 2007) 11

U.S. Dep't of Housing and Urban Dev., *FY 2004 Congressional Justifications* (2003), *available at* http://www.hud.gov/offices/cfo/reports/04estimates/centerse.pdf (last visited Jan. 29, 2007) 7

U.S. Dep't of Housing and Urban Dev., *FY 2005 Congressional Justifications* (2004), *available at* http://www.hud.gov/about/budget/ fy05/cjs/part3/fbcominitiative.pdf (last visited Jan. 29, 2007) 8

U.S. Dep't of Housing and Urban Dev., *FY 2006 Congressional Justifications* (2005), *available at* http://www.hud.gov/about/budget/fy06/cjs/ part3/fbcominitiative.pdf (last visited Jan. 29, 2007) 8

U.S. Dep't of Housing and Urban Dev., *FY 2007 Congressional Justifications* (2006), *available at* http://www.hud.gov/offices/cfo/reports/2007/cjs/ part3/fbcominitiative.pdf (last visited Jan. 29, 2007) 8

U.S. Dep't of Justice, *FY 2004 Performance and Accountability Report* (2004), *available at* http://www.usdoj.gov/ag/annual reports/pr2004/P4/p03-12.pdf (last visited Jan. 29, 2007) 9

Page(s)

U.S. Dep't of Justice, *FY 2005 Performance and Accountability Report* (2005), *available at* http://www.usdoj.gov/ag/annualreports/pr2005/P4/p03-13.pdf (last visited Jan. 29, 2007) 9

U.S. Dep't of Justice, *FY 2006 Performance and Accountability Report* (2006), *available at* http://www.usdoj.gov/ag/annual reports/pr2006/ P4/p03.pdf (last visited Jan. 29, 2007) 9

U.S. Dep't of Labor, *2004 Performance and Accountability Report* (2004), *available at* http://www.dol.gov/_sec/media/reports/annua l2004/ annualreport.pdf (last visited Jan. 29, 2007) 8

U.S. Dep't of Labor, *FY 2005 Performance Budget Overview*, *available at* http://www.dol.gov/_sec/budget2005/ overview-pb.pdf (last visited Jan. 29, 2007) 8

U.S. Dep't of Labor, *FY 2005 Performance and Accountability Report* (2005), *available at* http://www.dol.gov/_sec/media/reports/ annual2005/annualreport.pdf (last visited Jan. 29, 2007) 8, 9

Bush Administration Budget Proposals: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 107th Cong. (2001) (statement of Dennis Williams, Acting Asst. Sec'y for Mgmt. and Budget, Dep't of Health and Human Services) 11

Bush Administration's Health and Welfare Priorities: Hearing Before the House Comm. on Ways and Means, 107th Cong. (2001) (statement of Tommy Thompson, Sec'y of Health and Human Services) 11

Page(s)

President's 2003 Budget Proposals Featuring HHS Secretary Thompson: Hearing Before the House Comm. on Ways and Means, 107th Cong. (2002) (statement of Tommy Thompson, Sec'y of Health and Human Services).....11, 12

Revitalizing Communities: Are Faith-Based Organizations Getting the Federal Assistance They Need?: Hearing Before the Subcomm. on Federalism and the Census of the House Comm. on Gov't Reform, 109th Cong. (2005) (statement of Ryan Streeter, Director, Office of Faith-Based Initiatives, U.S. Dep't of Housing and Urban Development).....20, 21

Miscellaneous:

2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836).....26

3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836).....25, 26

1 W. Holdsworth, *A History of English Law* (7th ed. 1966).....28

The Federalist No. 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....26

5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987).....26

Page(s)

White House, *Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need* (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html (last visited Jan. 29, 2007) 23

White House Office of Faith-Based and Community Initiatives, *White House Faith-Based and Community Initiative*, *available at* http://www.whitehouse.gov/government/fbci/president-intiative.html (last visited Jan. 29, 2007) 4, 23

INTERESTS OF AMICI CURIAE[1]

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. The Council for Secular Humanism ("CSH") is an affiliate of CFI. Through education, research, publishing, social services, and other activities, including litigation, CFI and CSH encourage evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI and CSH believe that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amici* have submitted this brief because allowing access to the courts is critical to enforcing the boundaries between Church and State that are an essential part of our free society.

SUMMARY OF ARGUMENT

In response to the Executive's requests, Congress has consistently and intentionally funded the sustained government program — the Faith-Based and Community Initiatives ("Faith-Based Initiatives") — that is at the heart of Respondents' suit. The legislative record makes clear that Congress has closely collaborated with the Executive Branch to support and fund these Faith-Based Initiatives, of which the challenged activities are an integral part. Under these circumstances, the Petitioners have not fairly characterized this suit as solely a challenge to executive action.

Every year since the inception of the program in 2001, the President has asked Congress to fund the Faith-

---

[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent are being lodged herewith.

Based Initiatives at issue. Moreover, in each of those years, executive branch agencies described to Congress how the agencies have used congressionally appropriated funds to support the Faith-Based Initiatives, the steps taken to further the goals of those Initiatives, and the uses to which future funding of the Initiatives will be put. Specifically advised how the money would be used, Congress appropriated to the Executive funds which were, as promised, used for the Faith-Based Initiatives. In some cases, Congress instructed the agencies exactly how much money they were to use to support the Initiatives.

The Respondents have standing to challenge the use of such congressionally appropriated funds under the Court's decisions in *Flast v. Cohen*, 392 U.S. 83 (1968) and *Bowen v. Kendrick*, 487 U.S. 589 (1988). Because the Executive has repeatedly sought approval and funding for the Faith-Based Initiatives, and because Congress has in response consistently, knowingly and deliberately authorized such funding, it is irrelevant for purposes of standing whether the funding comes from a general appropriation or a separate statutory grant. There is no meaningful distinction between this case and the Court's decisions in *Flast* and *Bowen*, as all are challenges to programs intentionally funded by Congress pursuant to Article I, Section 8 of the Constitution and implemented by discretionary decisions of the Executive Branch at the taxpayers' expense. Indeed, if the Court were to hold that there could be no taxpayer standing under the circumstances of this case, it would allow Congress and the Executive Branch to insulate the government from Establishment Clause challenges in the courts by funding constitutionally questionable activities through general appropriations rather than express statutory directive.

Petitioners' brief makes no mention of Congress's systematic review and approval of funding for the Faith-Based Initiatives. In reaching its decision below, the court of

appeals was apparently not aware of the connection between the Congress and the expenditures supporting the Faith-Based Initiatives. Pet. App. 10a-11a. In light of the indisputable legislative record set forth below, the Court should affirm the court of appeals' decision and find taxpayer standing for the same reasons standing was found in *Flast* and *Kendrick*. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted because the question framed in the petition — whether taxpayers have standing to challenge Executive Branch conduct financed "only *indirectly* through general appropriations" — is not presented by the record in this case.

I. THE LEGISLATIVE RECORD DEMONSTRATES CONGRESSIONAL INTENT TO FUND THE FAITH-BASED INITIATIVES

From the inception of the program, Congress was advised of the President's Faith-Based Initiatives and the needed funding. In 2001, President Bush sent a message to Congress entitled "Rallying the Armies of Compassion." H.R. Doc. No. 107-36 (2001). As part of that message to Congress, the President sent to Congress Executive Orders 13,198 and 13,199, which called for the creation of the White House Office of Faith-Based and Community Initiatives and instructed that Centers for Faith-Based and Community Initiatives ("Faith-Based Centers") be established in the Departments of Health and Human Services, Housing and Urban Development, Justice, Labor and Education. *Id.* at 4, 13. The White House subsequently issued Executive Orders establishing Centers in the Department of Agriculture and the Agency for International Development, Exec. Order No. 13,280, 3 C.F.R. at 262 (2003), the Department of Commerce, the Department of Veterans Affairs and the Small Business Administration,

Exec. Order No. 13,342, 3 C.F.R. at 180 (2005), and the Department of Homeland Security, Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 7, 2006).

From fiscal year 2002 to 2005, just five of these Centers spent an estimated $24 million on "administrative" activities.[2] The Centers spent the money, in part, to host "regional conferences and targeted workshops to continue [their] support for the work of effective faith-based and community social service programs."[3] As explained below, Congress intended that its appropriations would be used to finance the administration of the Faith-Based Initiatives, including the very type of conferences that are challenged in this lawsuit.

A. The President's Annual Budgets and Executive Agencies' Budget Documentation Describe and Seek Funding for the Agencies' Implementation of the Faith-Based Initiatives

In every year since the inception of the Faith-Based Initiatives, the United States Budget submitted to Congress by the President has made clear the overall purpose of the Faith-Based Initiatives.[4] The United States Budgets have

---

[2] U.S. Government Accountability Office, GAO-06-616, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 16 (2006), *available at* 2006 WL 2007191.

[3] White House Office of Faith-Based and Community Initiatives, *White House Faith-Based and Community Initiative*, *available at* http://www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

[4] United States Government, *FY 2002 Budget* 56 (2001), *available at* http://www.gpoaccess.gov/usbudget/fy02/browse.html (last visited Jan. 29, 2007) [hereinafter "*2002 Budget*"] ("With this budget, the President commits our Nation to mobilizing the armies of compassion — charities and churches, communities and corporations, ministers and mentors — to

also included specific discussions of what the individual agencies have done to support the White House's mandate, including the type of "outreach" activities challenged by Respondents. For example, the 2005 Budget stated that the Department of Labor had "taken significant steps to improve communications and outreach to faith-based and community-based organizations," *2005 Budget* at 234, and the Department of Justice had "made considerable progress in expanding outreach efforts that provide grant announcements and updates to faith-based and community groups." *Id.* at 220. The 2005 Budget also stated that the Department of Education, in support of the President's Initiatives, "conducted extensive outreach and technical assistance. The

---

transform lives."); United States Government, *FY 2003 Budget* 141 (2002), *available at* http://www.gpoaccess.gov/usbudget/fy03/browse.html (last visited Jan. 29, 2007) [hereinafter "*2003 Budget*"] ("The initiative expands the access of community and faith-based organizations on a non-discriminatory basis to existing federally funded programs."); United States Government, *FY 2004 Budget* 118 (2003), *available at* http://www.gpoaccess.gov/usbudget/fy04/browse.html (last visited Jan. 29, 2007) [hereinafter "2004 Budget"] ("The President envisions a faith-friendly environment where faith-based organizations can compete equally to provide government-sponsored services."); United States Government, *FY 2005 Budget* 145 (2004), *available at* http://www.gpoaccess.gov/usbudget/fy05/browse.html (last visited Jan. 29, 2007) [hereinafter "*2005 Budget*"] (same); United States Government, *FY 2006 Budget* 41 (2005), *available at* http://www.gpoaccess.gov/usbudget/fy06/browse.html (last visited Jan. 29, 2007) [hereinafter "*2006 Budget*"] ("One of the efforts central to the President's support for the compassionate spirit of America has been his establishment of the White House office of Faith-Based and Community Initiatives. This office is dedicated to helping faith-based and community groups participate in Government-supported social service programs . . . ."); United States Budget, *FY 2007 Budget* 115-16 (2006), *available at* http://www.gpoaccess.gov/usbudget/fy07/browse.html (last visited Jan. 29, 2007) [hereinafter "*2007 Budget*"] (discussing the Compassion Capital Fund and other programs under the Faith-Based and Community Initiatives).

staff has organized 23 workshops, distributed 45,000 pieces of literature, maintained contact with 5,000 local organizations, and established an informative website." *Id.* at 113.[5] Similar updates of the activities undertaken by the executive agencies in support of the Faith-Based Initiatives have been contained in the United States Budget each year since the Faith-Based Initiatives were created in support of the President's requests for appropriations to fund such activities.[6]

---

[5] *See also 2005 Budget, supra* note 4, at 113 ("As a direct result of these activities and efforts [at the Department of Education]. . . participation by FBCOs [Faith-Based and Community Organizations] in targeted discretionary grant programs has quadrupled since 2001."); *id.* at 159 ("As part of its outreach and technical assistance efforts, HHS has awarded grants to umbrella organizations to assist small and novice grantees in navigating the grant application process . . . ."); *id.* at 188 ("Rules to help increase participation among faith-based organizations for eight major programs took effect on September 30, 2003. HUD also developed an outreach and technical assistance plan to increase the quality of grant applications from such grassroots organizations.").

[6] *See 2003 Budget, supra* note 4, at 114 ("[The Department of] Education is actively implementing the President's Faith-Based and Community Initiative. . . . Education has identified barriers to participation in its programs and has developed a strong plan for eliminating those barriers."); *id.* at 181 ("Expanding the opportunities and success of faith-based and community development organizations is a HUD strategic goal."); *2004 Budget, supra* note 4, at 100 ("Education . . . provided technical assistance and outreach to FBCOs."); *id.* at 138 ("HHS has improved outreach to FBO/CBOs by establishing 1-800 numbers, streamlining web-based access and providing single points of contact in key agencies. Training initiatives are giving small and novice grantees the tools to compete for grants."); *2006 Budget, supra* note 4, at 68 ("USDA . . . initiated pilot projects and related evaluations to encourage greater involvement by [faith-based and community-based] organizations, and enhanced outreach and technical assistance capabilities."); *id.* at 177 ("HUD expanded its outreach to community organizations, including faith-based organizations, attempting to level the playing field for its formula and competitive grants."); *id.* at 215 ("DOL

Individual agencies have also repeatedly submitted budget justifications providing detailed explanations to Congress that the agencies are seeking congressionally appropriated funds to support the Faith-Based Initiatives, including the "outreach" activities challenged in this lawsuit. For example, the budget for HHS has included a line item for its Faith-Based Center of at least $1 million every year since the Center was established.[7] The 2004 "Congressional Justifications" for the office of Housing and Urban Development ("HUD") discussed in detail the activities of its Center, noting to justify its travel expenses that "HUD's field offices frequently partner with State and local governments to conduct conferences on information related to faith-based and community organizations." U.S. Dep't of Housing and Urban Dev., *FY 2004 Congressional Justifications* B-2 (2003), *available at* http://www.hud.gov/offices/cfo/reports/04estimates/centerse.pdf (last visited Jan. 29, 2007). HUD's justifications for 2005, 2006 and 2007 contained the same explanation. In each of these justifications, the Department described the previous year's actual budget, the current year's estimate and the following year's request for administrative expenses associated with the Center. The

---

has made significant progress in providing outreach and technical assistance to enhance opportunities for faith-based and community organizations (FBCOs) to compete for Federal funding."); *2007 Budget*, *supra* note 4, at 179 ("The Department [of Justice] continues to conduct outreach to FBCOs . . . ."); *id.* at 284 ("The [Small Business Administration] established a faith-based center that works with community and faith-based groups to ensure access to SBA technical assistance grants.").

[7] *2002 Budget*, *supra* note 4, app. at 470; *2003 Budget*, *supra* note 4, app. at 462; *2004 Budget*, *supra* note 4, app. at 434; *2005 Budget*, *supra* note 4, app. at 456; *2006 Budget*, *supra* note 4, app. at 463; *2007 Budget*, *supra* note 4, app. at 459.

actual and projected administrative expenses exceeded $1.8 million every year.[8]

Performance and Accountability Reports submitted annually to Congress also demonstrate that Congress was kept well-informed of the agencies' activities. The Department of Labor's 2004 Report explained that "[t]he Department is working with workforce boards nationwide to increase partnerships with faith-based and community organizations that help transition hard-to-serve individuals into employment." U.S. Dep't of Labor, *2004 Performance and Accountability Report* 33 (2004), *available at* http://www.dol.gov/_sec/media/reports/annual2004/annualreport.pdf (last visited Jan. 29, 2007). The following year, the budget requested $2 million to support the President's Faith-Based Initiatives, U.S. Dept of Labor, *FY 2005 Performance Budget Overview* 28, *available at* http://www.dol.gov/_sec/budget2005/overview-pb.pdf (last visited Jan. 29, 2007), and the Performance and Accountability Report noted that "DOL [Department of Labor] extends its outreach to FBCOs [Faith-Based and Community Organizations] well beyond the confines of direct grant programs. Forty-eight intermediaries have worked with over 300 grassroots organizations since 2001 through DOL's coordination and funding support." U.S.

---

[8] U.S. Dep't of Housing and Urban Dev., *FY 2005 Congressional Justifications* B-6 (2004), *available at* http://www.hud.gov/about/budget/fy05/cjs/part3/fbcominitiative.pdf (last visited Jan. 29, 2007) ($2,667,000 requested for 2005); U.S. Dep't of Housing and Urban Dev., *FY 2006 Congressional Justifications* B-6 (2005), *available at* http://www.hud.gov/about/budget/fy06/cjs/part3/fbcominitiative.pdf (last visited Jan. 29, 2007) ($1,917,000 requested for 2006); U.S. Dep't of Housing and Urban Dev., *FY 2007 Congressional Justifications* B-6 (2006), *available at* http://www.hud.gov/offices/cfo/reports/2007/cjs/part3/fbcominitiative.pdf ($1,964,000 requested for 2007) (last visited Jan. 29, 2007).

Dep't of Labor, *FY 2005 Performance and Accountability Report* 36 (2005), *available at* http://www.dol.gov/_sec/media/reports/annual2005/ annualreport.pdf (last visited Jan. 29, 2007).

Reports submitted by other agencies revealed similar activities. For example, the Department of Justice explained in its 2004 Report that "DOJ's OJJDP [Office of Juvenile Justice and Deliquency Prevention] hosted four free regional technical assistance conferences for FBOs/CBOs [Faith-Based Organizations/Community-Based Organizations] to help them navigate the federal grant application process." U.S. Dep't of Justice, *FY 2004 Performance and Accountability Report* IV-12 (2004), *available at* http://www.usdoj.gov/ag/annualreports/pr2004/P4/p03-12.pdf (last visited Jan. 29, 2007). The following year, DOJ "hosted three free regional technical assistance conferences to help FBCOs navigate the federal grant application process. DOJ also provided such assistance at one White House conference." U.S. Dep't of Justice, *FY 2005 Performance and Accountability Report* IV-12 (2005), *available at* http://www.usdoj.gov/ag/annualreports/pr2005/P4/p03-13.pdf (last visited Jan. 29, 2007). In 2006, DOJ "hosted two free regional technical assistance conferences to help FBCOs navigate the federal grant application process. The Department also provided such assistance at nine White House conferences." U.S. Dep't of Justice, *FY 2006 Performance and Accountability Report* IV-12 (2006), *available at* http://www.usdoj.gov/ag/annualreports/pr2006/P4/p03.pdf (last visited Jan. 29, 2007).

Likewise, the Department of Agriculture explained in its 2005 Report that USDA had "coordinated outreach and technical assistance by developing [a] comprehensive strategy using 12 best practices." U.S. Dep't of Agriculture, *2005 Performance and Accountability Report* 25 (2005), *available at* http://www.ocfo.usda.gov/usdarpt/par2005/

pdf/par2005.pdf (last visited Jan. 29, 2007). Actions taken in 2006 included "[c]onducting almost 4,600 outreach and technical assistance activities throughout the country to help engage faith-based and community organizations as partners." U.S. Dep't of Agriculture, *2006 Performance and Accountability Report* 28 (2006), *available at* http://www.ocfo.usda.gov/usdarpt/pdf/par2006.pdf (last visited Jan. 29, 2007).

Budget summaries compiled by other agencies also reveal detailed descriptions of their activities in support of the Faith-Based Initiatives. For example, the Department of Education's 2005 budget briefing stated that it "[c]oordinated conferences and workshops around the country in support of the Initiative" and that it "[e]quipped regional representatives of the Department with outreach tools for community-and faith-based organizations." U.S. Dep't of Educ., *FY 2005 Budget: Summary and Background Information* 80 (2004), *available at* http://www.ed.gov/about/overview/budget/budget05/summary/05summary.pdf (last visited Jan. 29, 2007). The following year, the Department reported that it had "[m]et with State and local leaders of community- and faith-based organizations to encourage collaboration with the Department." U.S. Dep't of Educ., *FY 2006 Budget: Summary and Background Information* 87 (2005), *available at* http://www.ed.gov/about/overview/budget/budget06/summary/06summary.pdf (last visited Jan. 29, 2007). In the 2007 briefing, the Department explained that it had "[h]eld technical assistance workshops in Phoenix, Chicago, Los Angeles, New York, Atlantic City, Washington, D.C., and New Orleans with leaders of community- and faith-based organizations to encourage collaboration with the Department." U.S. Dep't of Educ., *FY 2007 Budget: Summary and Background Information* 92 (2006), *available at* http://www.ed.gov/

about/overview/budget/budget07/summary/07summary.pdf (last visited Jan. 29, 2007).[9]

The Executive's plans to use congressionally appropriated funds to support the Faith-Based Initiatives were also repeatedly explained to the House Ways and Means Committee during budget hearings. In 2001, the Secretary of Health and Human Services stated that HHS' "budget framework . . . includes $3 million to establish a Center for Faith-Based and Community Initiatives in the Department in accordance with the President's recent Executive Order."[10] Another HHS official further explained that funding was required to "provide 15 new FTE needed to support the Department's Faith-Based Center established in accordance with the President's recent Executive Order."[11] The following year, the Secretary returned to Capitol Hill to request further funding for the ongoing operation of the Faith-Based Center, explaining that his budget included "$1.6 million to continue the Department's Center for Faith-Based and Community Initiatives established under the President's Executive Order."[12]

---

[9] After the President's budget is transmitted to Congress, the Secretary makes available the briefing documents cited above to provide summary and background information on the new budget. Dep't of Education, *Overview: Budget Process in the U.S. Department of Education*, *available at* http://www.ed.gov/about/overview/budget/process.html (last visited Jan. 29, 2007).

[10] *Bush Administration's Health and Welfare Priorities: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 15 (2001) (statement of Tommy Thompson, Sec'y of Health and Human Services).

[11] *Bush Administration Budget Proposals: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 107th Cong. 12 (2001) (statement of Dennis Williams, Acting Asst. Sec'y for Mgmt. and Budget, Dep. of Health and Human Services).

[12] *President's 2003 Budget Proposals Featuring HHS Secretary Thompson: Hearing Before the House Comm. on Ways and Means*,

This record makes it abundantly clear that the President and the heads of executive agencies informed Congress every year since the inception of the Faith-Based Initiatives that the Executive Branch was seeking and using congressionally appropriated funds to finance those Initiatives, including the conferences and other "outreach" programs that are an integral part of the Initiatives.

B. Congress Not Only Provided Appropriations in Response to the Repeated Budget Requests, but in Some Cases Explicitly Directed That the Funds Be Used to Administer the Faith-Based Centers

Year after year, after receiving budgets and supporting documentation from the President and executive agencies seeking congressional funding to support the Faith-Based Initiatives, Congress passed appropriations bills providing the Executive with the requested funds.[13] Although Congress was advised how the Executive intended to use those general appropriations, it never forbade the Executive from financing the Faith-Based Initiatives or the Faith-Based Centers established in each agency. To the contrary, the legislative record shows that in some cases Congress *explicitly directed* that the money it appropriated be used to fund the Faith-Based Initiative.

107th Cong. 16 (2002) (statement of Tommy Thompson, Sec'y of Health and Human Services).

[13] *See, e.g., Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006*, Pub. L. No. 109-149, 119 Stat. 2833 (2005); *Consolidated Appropriations Act, 2005*, Pub. L. No. 108-447, 118 Stat. 2809 (2004); *Consolidated Appropriations Act, 2004*, Pub. L. No. 108-199, 118 Stat. 3 (2004); *Consolidated Appropriations Resolution, 2003*, Pub. L. No. 108-7, 117 Stat. 11 (2003).

A report commissioned by members of Congress and prepared by the Government Accountability Office in 2006 recognized that some of the agencies that included information on funding for their Centers in their budget requests "received guidance from Congress . . . on the amount of resources to allocate to their [Faith-Based] centers."[14] Such guidance was explicitly set forth in the final Conference Reports accompanying some of the appropriations bills.

For example, the Conference Report accompanying the 2002 appropriations bill for the Departments of Labor, Health and Human Services, and Education and related agencies, stated that "the agreement includes $1,500,000 for the Faith Based Center [of HHS] instead of $3,000,000 as proposed by the House." H.R. Rep. No. 107-342, at 108 (2001) (Conf. Rep.). The Conference Report which accompanied the 2005 consolidated appropriations bill stated that, again with respect to HHS, "[t]he conference agreement provides $1,386,000 for the center for faith-based and community initiatives as proposed by the Senate rather than $1,400,000 as proposed by the House." H.R. Rep No. 108-792, at 1198 (2004) (Conf. Rep.).

Congress has in fact exercised a significant degree of control over the appropriated funds, at times urging the Executive to coordinate more closely with it to implement the Initiatives. For example, with respect to the 2003 appropriations bill, the Conference Report stated with respect to the Department of Agriculture:

---

[14] U.S. Government Accountability Office, GAO-06-616, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 21 (2006), *available at* 2006 WL 2007191.

> The conferees are seriously concerned by the growing frequency of departmental and agency initiatives for which the required prior notification to the Committees on Appropriations has not been provided. The conferees note the efficiencies which attach to the least possible statutory requirements and the benefits which accrue to the more flexible Congressional direction expressed in Committee reports. However, the continuing practice of reliance on Committee report language must be accompanied by departmental and agency compliance with Congressional directives. . . . Such notification was not provided in . . . the establishment of a Faith-Based and Community Initiatives Center.

H.R. Rep. No. 108-10, at 550 (2003) (Conf. Rep.).[15] In other words, the Congress and the Executive had an understanding: So long the Executive coordinated with Congress and used the money as Congress intended, then Congress would continue to provide the funds through the general appropriations route rather than by enacting specific statutory requirements.

---

[15] Further demonstrating congressional control over funding of the Initiatives, the resulting public law explained that "[n]one of the funds provided by this Act, or provided by previous Appropriations Acts to the agencies funded by this Act . . . shall be available for obligation or expenditure through a reprogramming of funds which . . . creates new programs" or "increases funds or personnel by any means for any project or activity for which funds have been denied or restricted" "unless the Committees on Appropriations of both Houses of Congress are notified 15 days in advance of such reprogramming of funds." *Consolidated Appropriations Resolution*, Pub. L. No. 108-7, § 720(a), 117 Stat. 11, 40 (2003). Similarly, the agencies were not permitted to reprogram funds in excess of a certain amount to "augment[] existing programs, projects, or activities" without prior notification. *Id.* § 720(b).

The same 2003 Conference Report recommended an appropriation of $2,606,000 for the Center for Faith-Based and Community Initiatives in HUD and included language "directing the Department to allocate funds provided under this heading in the manner specified in the joint explanatory statement of the managers accompanying this Act unless the Committees on Appropriations are notified and approve of any changes in the operating plan or through a reprogramming." H.R. Rep. No. 108-10, at 1425 (2003) (Conf. Rep.). A similar statement was contained in the Conference Report for the 2004 appropriations, which appropriated $2,639,000 for the HUD Center. H.R. Rep No. 108-401, at 1103 (2003) (Conf. Rep.).

In sum, Congress, with full knowledge of the activities of the Faith-Based Centers, made a deliberate decision to fund them each year. In fact, contrary to the assumption of the court below, *see* Pet. App. 11a, in a number of instances Congress, through its Committee Reports, explicitly "earmarked" funds to support the Faith-Based Centers established in executive agencies.

II. CONGRESS'S DELIBERATE FUNDING OF THE FAITH-BASED INITIATIVES AND CENTERS ESTABLISHES RESPONDENTS' STANDING UNDER *FLAST* AND *KENDRICK*

A. As in *Flast* and *Kendrick*, the Required Nexus Exists Between Respondents' Taxpayer Status and Congressional Funding

Just last year, this Court reaffirmed that "'a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of the Establishment Clause.'" *DaimlerChrysler Corp. v. Cuno,* 126 S. Ct. 1854, 1864 (2006) (*quoting Flast*, 392 U.S.

at 105-06). The Court also has repeatedly held that a taxpayer has standing to challenge such congressional action even if it is an executive branch official who makes the ultimate determination to administer the funds in a manner alleged to be in violation of the Establishment Clause. *See Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 103. Thus in *Kendrick*, the Court held that "there is . . . a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." 487 U.S. at 620. That nexus existed in *Kendrick* because Congress had authorized the Secretary to expend the money pursuant to "a program of disbursement of funds pursuant to Congress' taxing and spending powers . . . ." *Id.* at 619-20. In light of Congress's intent to fund the Faith-Based Initiatives and the Centers administering those Initiatives, the same "nexus" unquestionably exists here between the Respondents' status as taxpayers and congressional taxing and spending authority under Article I, Section 8.

There is no dispute that, as in *Flast* and *Kendrick*, the conferences and other activities challenged in this lawsuit were funded by Congress with taxpayer dollars pursuant to Article I, Section 8. Unable to refute that fact, Petitioners argue that the lawsuit at issue must be deemed a challenge to executive action, rather than legislative action, because Congress had no responsibility for the decisions of the Executive Branch to use the appropriated funds in a manner alleged to favor religion. *See, e.g.*, Pet. Br. 25 (asserting with no supporting citation that the funds at issue "were appropriated without attached conditions or programmatic directives for the President's discretionary use within the Executive Office of the President and federal agencies"). In light of the legislative record set forth above, Congress shares full responsibility for the Executive Branch's use of

the funds that Congress appropriated to support the Faith-Based Initiatives.

The "nexus" between the taxpayer's standing as a taxpayer and the exercise of Congress's taxing and spending power is not destroyed because Congress has chosen to fund the Faith-Based Initiatives through general appropriations rather than by separate statute. Congress plainly expected the Executive to use its lump-sum appropriations consistent with the Executive's budget requests. *See In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 321 (1975) ("'[T]he relationship with the Congress demands that the detailed justification[s] which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills.'" (*quoting* H.R. Rep. No. 93-662, at 16 (1973))). Indeed, as described in Part I.B., *supra*, Congress went so far as expressly to dedicate appropriations to certain Faith-Based Centers in Conference Reports of the Appropriations Committees. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (quotations and citations omitted); *In re LTV Aerospace Corp.*, 55 Comp. Gen. at 318 (although Committee Reports do not impose binding restrictions, "[t]his is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in committee reports"). When the Executive and Legislative branches are working in tandem in this fashion to support a common goal, the theoretical discretion of the Executive administering the funds is no "circuit breaker" between the

taxpayer challenge and congressional taxing and spending action. Pet. Br. 31.[16]

Moreover, as the legislative record makes clear, the Faith-Based Initiatives bear far closer resemblance to the "program of disbursement of funds pursuant to Congress' taxing and spending powers" at issue in *Kendrick* than the independent, unilateral Executive Branch decisions that Petitioners portray as being at issue in this case. 487 U.S. at 619-20. The Faith-Based Initiatives are not analogous to an isolated Executive Branch decision to "host a summit of foreign leaders" or to give a particular speech. Pet. Br. 26. *Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 & n.17 (1982) (one-time decision by the Secretary of Health, Education, and Welfare to transfer a single parcel of land acquired thirty years prior was not an exercise of authority conferred by the taxing and spending power). The Faith-Based Initiatives are an extensive series of programs that were methodically and systematically created and implemented over many years and which involve millions of dollars in taxpayer funds. From the moment the Initiatives were created, the President presented them to Congress, and ever since that time Congress has played an instrumental role in their implementation.

---

[16] We are not arguing that the Executive Branch lacks any discretion concerning the use of funds in a lump-sum appropriation. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). "'[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." *Id.* (*quoting In re LTV Aerospace Corp.*, 55 Comp. Gen. at 319). However, the question is not whether the Executive was legally required to use the appropriations for the administration of the Faith-Based Initiatives. The question is whether congressional involvement is sufficient to establish a nexus between the taxpayer's status as a taxpayer and Congress's exercise of its authority under Article I, Section 8. *See Flast*, 392 U.S. at 102.

Because Congress intentionally funded the Faith-Based Initiatives, of which the challenged actions were a part, it does not matter that the Executive made the final decision regarding the precise allocation of the funds. Neither *Flast* nor *Kendrick* required that Congress detail the final destination of every appropriated penny for taxpayer standing to be found. To the contrary, *Flast* and *Kendrick* were also brought as suits against Executive Branch officials administering the programs.

In *Flast*, the taxpayers challenged the disbursement of funds under Title I and II of the Elementary and Secondary Education Act of 1965. 329 U.S. at 85. Title I of that Act provided for federal payments to state educational agencies, which then passed on the payments in the form of grants to local educational agencies which used the grants to fund their own plans and programs. *Id.* at 85-86. The Commissioner of Education was given broad discretion over those grants. *See id.* at 86 ("[T]he Commissioner of Education is given broad powers to supervise a State's participation in Title I programs and grants."). Nor did Title II of the Act, which established a program of grants for instructional materials, require disbursements to be made to *religious* schools. *See id.* at 86-87 (explaining that Title II of the Act calls for federal grants to provide instructional materials for use "in public and private elementary and secondary schools" (*quoting* 20 U.S.C. § 821)). In fact, in *Flast* the complaint alleged in the alternative that the funding to religious schools was not even authorized by the Act. *Id.* at 87. The *Flast* court nevertheless found that the "[taxpayers'] constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare." *Id.* at 103.

Similarly, *Kendrick* involved a challenge to a federal grant program that the Court found to be facially compliant with the Establishment Clause. 487 U.S. at 593. In holding

that the statute did not on its face violate the Establishment Clause, the Court concluded that the statute reflected a "successful maintenance of a course of neutrality among religions, and between religion and nonreligion." *Id.* at 607 (quotations and citations omitted). It was thus clear that the Act did not mandate the Secretary of Health and Human Services to administer the Act in the manner which gave rise to the "as applied" challenge. *Id.* at 593. Nevertheless, this Court concluded that the claims raised by the taxpayers were not "any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Id.* at 619.

Nor can the expenditures to fund the conferences at issue be reasonably characterized as merely "incidental" or "regulatory" in nature. *See id.*; *see also Flast*, 392 U.S. at 102. Although Petitioners attempt to reduce the multimillion dollar expenditure which funds the Faith-Based Centers to incidental "speeches and meetings," Pet. Br. 26, these conferences, workshops and other outreach efforts aimed at funneling federal funds to faith-based organizations cannot be separated from Congress's authorization of the Faith-Based Centers and their work.

For example, defendant Ryan Streeter, Director of the HUD Office of Faith-Based Initiatives, explained to a House subcommittee that:

> In 2003, HUD responded to this problem [of supposed barriers to inclusion of faith-based and community organizations] by appointing faith-based and community liaisons in each of its 81 regional and field offices. These liaisons spend significant amounts of time educating grassroots organizations about HUD, how it works, and how its funds and other resources can be accessed.

> We have not stopped there. Another significant barrier has been the lack of understanding among small organizations about what makes the grant application successful. *So in 2004, HUD completed 180 2-day free grant writing seminars for faith-based and community organizations across the Nation. More than 16,000 from more than 10,500 organizations participated in these sessions, which consisted of hands-on practical grant writing training delivered by professionals.*[17]

Such substantial and systematic expenditure of taxpayer funds to support the congressionally sanctioned activities of the Centers is, according to the allegations in the Complaint, which at this stage must be taken to be true, a "direct dollars-and-cents injury" to the taxpayers. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *cf. id.* (taxpayer challenge to the reading of five Bible verses involved no "measurable appropriation" of school district funds). Permitting taxpayer standing in this case will not therefore open the floodgates for taxpayer standing in connection with every "incidental expenditure of tax funds" in the conduct of the Executive's business as the hyperbolic warning by Petitioners and its *amici* would suggest.

---

[17] *Revitalizing Communities: Are Faith-Based Organizations Getting the Federal Assistance They Need?: Hearing Before the Subcomm. on Federalism and the Census of the House Comm. on Gov't Reform*, 109th Cong. 7 (2005) (Statement of Ryan Streeter, Director, Office of Faith-Based Initiatives, U.S. Dep't of Housing and Urban Development) (emphasis added).

B. *Flast* and *Kendrick* Do Not Limit Standing Only to Those Instances When Funds Are Disbursed Outside of the Government

Nothing in *Flast* or *Kendrick* limits taxpayer standing to situations involving a direct grant of appropriated funds to nongovernmental parties. *Flast* explained that "one of the specific evils feared by those who drafted the Establishment Clause" was the danger that "the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. Support to religion can take many forms other than monetary aid to third parties.

For example, as Judge Posner stated below, if the Petitioners' proposed limitation were adopted, a taxpayer would not have standing to challenge under the Establishment Clause an executive official's decision (or even a specific congressional appropriation) to "build a mosque and pay an Imam a salary to preach in it" because such action would not involve a grant to a third party. Pet. App. 11a-13a. *But see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church."). Likewise, if the Petitioners' reading of *Flast* were adopted, staff members of the Faith-Based Centers could use taxpayer funds to support a systematic campaign to travel across the country hosting worship services and proselytizing. The latter hypothetical is not too far removed from the allegations in this case. *See* Pet. App. 10a (opinion below stating that the complaint "portrays the conferences organized by the various Centers as propaganda vehicles for religion"); Amended Compl. ¶¶ 32, 37, 40. There is no principled basis on which to deny taxpayer standing to challenge such expenditures by the government but to allow standing when the money

ultimately flows into the coffers of a third party. The injury to the taxpayer in both circumstances — the use of taxpayer funds to support or favor religion — is identical.

Moreover, Petitioners' argument that standing is inappropriate in this case because "the statutory direction is for the Executive to do something other than disburse funds," Pet. Br. 29, is misplaced. The central purpose of the Faith-Based Initiatives is to facilitate the disbursement of grants to "faith-based and community organizations." In March 2006, the White House explained that more than $2.1 billion in grants had been awarded to religious organizations in Fiscal Year 2005 by seven federal agencies.[18] The conferences being challenged are an integral part of the congressionally sanctioned process of awarding grants, as they are intended to "provide participants with information about the government grants process and available funding opportunities" to "empower[] FBCOs [Faith-Based and Community Organizations] to compete more effectively for funds."[19]

In any event, the government's provision of training and information to religious groups to assist them in obtaining grants confers a benefit on the groups even if no money is paid out at the conferences themselves. Such preferential access to government funds is itself a valuable commodity. From the perspective of the taxpayer who must fund the conferences, it does not matter that such a benefit takes a form other than cash payments. There is simply no

---

[18] White House, *Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need* (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html (last visited Jan. 29, 2007).

[19] White House Office of Faith-Based and Community Initiatives, *White House Faith-Based and Community Initiative*, *available at* http://www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

basis to require that alleged aid to religion take the form of cash disbursements in order for a taxpayer to have standing.

C. Failure to Find Standing in This Case Would Allow Congress and the Executive to Collaborate to Circumvent the Establishment Clause

By declining to find standing for taxpayers in this case, the Court would create a loophole allowing the government to support religion and insulate its actions from judicial review. Congress and the Executive could collaborate to give preferential treatment to religious groups, but deny taxpayers standing to challenge such action by funding it through a general appropriation rather than by separate statute.

The collaboration between Congress and the Executive to fund the Faith-Based Initiatives shows exactly how such general appropriations can be used to obtain a shared objective of Congress and the Executive without an express statutory grant of authority. Each year the Executive requested funding for its Faith-Based Initiatives in budget documentation and Congress provided the requested funding. Congress was also able to provide specific direction as to the use of the funds without imposing a statutory requirement by stating in committee reports how it wishes the Executive to spend the money that the Executive Branch has requested. *See, e.g.*, H.R. Rep. No. 108-10, at 1425 (2003) (Conf. Rep.). Even though the Executive is not technically bound by Committee Reports, as a practical matter the understanding between the two Branches is that the appropriations will be allocated to specific uses.

For purposes of standing, there is no meaningful distinction between such an agreement as to use of funds provided as part of the general appropriations process and a

separate statutory mandate that specifically directs the use of the funds. Denying standing to challenge the Executive's use of funds appropriated through informal direction will only encourage use of such devices when Congress knows its objectives test the limits of the Establishment Clause. Failure to find taxpayer standing in this case would foreclose a critically important means of redress against such collaborative action by Congress and the Executive.

III. INSULATING THE EXECUTIVE'S USE OF CONGRESSIONALLY APPROPRIATED FUNDS FROM A TAXPAYER'S ESTABLISHMENT CLAUSE CHALLENGE WOULD BE INCONSISTENT WITH THE INTENT OF THE FRAMERS OF THE CONSTITUTION

Effectively, what Petitioners maintain is that Executive Branch action is immune from an Establishment Clause lawsuit brought by taxpayers because the Executive's expenditure of congressionally authorized funds is solely a matter for the Executive's discretion. The notion that somehow the Executive Branch would have the ability to direct public money to support religion on its own accord would have astonished the nation's Founders. The Founders would never have regarded the Executive Branch as having the power to undertake a broad program such as the Faith-Based Initiatives without congressional support.

To the contrary, the Founders understood that the Executive could not make significant expenditures absent congressional authorization, because Congress controlled the "purse," that is, the power to tax and spend.[20] This belief

---

[20] *See* Remarks of George Nicholas, *in* 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal*

was informed by their familiarity with English history, in particular, with the English Bill of Rights of 1689, which definitively resolved Parliament's authority over matters of taxation and expenditure. Among other things, the English Bill of Rights provided "That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." 5 *The Founders' Constitution* 2 (Philip B. Kurland & Ralph Lerner eds., 1987). Indeed, both proponents and opponents of the Constitution demonstrated their familiarity with the English Bill of Rights and its declaration of legislative supremacy by referring to it frequently in the debates over the proposed Constitution.[21]

Constitution, at 17 (2d ed. 1836) [hereinafter "*Debates*"] ("Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence . . ." and, consequently, the House of Representatives will be able to oppose and check the president's power); Remarks of Oliver Ellsworth, *in* 2 J. Elliot *Debates*, *supra*, at 195 (Congress will have the "power of the sword" and the "power of the purse"); Remarks of Gov. Randolph, *in* 3 J. Elliot *Debates*, *supra*, at 201 (in England, "the sword and the purse are in different hands," but in America, Congress gives the money and must be consulted on war; the Executive "can handle no part of the public money except what is given him by law."). *See also The Federalist No. 72*, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If a British House of Commons, from the most feeble beginnings, *from the mere power of asserting or disagreeing to the imposition of a new tax*, have, by rapid strides, reduced the prerogatives of the crown . . . what would be to be feared from an elective magistrate of four years' duration with the confined authorities of a President of the United States?") (emphasis in original).

[21] *See, e.g.*, Remarks of George Nicholas, *in* 3 J. Elliot *Debates*, *supra* note 20, at 19 (1689 Declaration of Rights limited "the prerogative of the crown"); Remarks of Patrick Henry, *in* 3 J. Elliot *Debates*, *supra* note 20, at 316-17 (1689 Bill of Rights "put an end to all [tyranny], by defining the rights of the people, and limiting the king's prerogative").

Because the Founders assumed that Congress would have the power to control spending, when the First Congress adopted the Bill of Rights, they framed the prohibitions of the Establishment Clause as a restriction on Congress's power to pass laws. As this Court has emphasized on numerous occasions, the Founders were especially (although not exclusively) concerned with the possibility that the new federal government might tax the people to support a religious institution or institutions and, accordingly, they wanted to prohibit Congress from levying taxes "to support any religious activities or institutions." *Everson v. Bd. of Educ.*, 330 U.S. at 16. Of course, the entire Bill of Rights, including the Establishment Clause, was intended to bind the government as a whole. However, because the Founders understood that only Congress has the power to levy taxes and make appropriations, it would have been both superfluous and incongruous to phrase the Establishment Clause as "The Congress and the President shall make no law respecting an establishment of religion."

Yet, this is precisely the historically blind interpretation of the Establishment Clause and Article III that Petitioners urge this Court to adopt. In accepting Petitioners' argument, this Court would allow an alleged establishment of religion to go unchallenged under the pretense that the Executive's actions were not authorized by Congress. The Founders would not have accepted the notion that the Executive could implement a program of the scale at issue in this case without congressional sanction and funding. In forbidding the Congress from passing a law establishing religion, the Founders would have understood that Congress could not evade that restriction through the fiction that it was the Executive, and not Congress, directing the spending of taxpayer money.

But Petitioners' misreading of history goes even deeper. One of the cornerstones of Petitioners' argument is

the proposition that taxpayers cannot challenge the expenditures at issue because the expenditures are "for the government's internal operations." Pet. Br. 41. Petitioners forget that the Church of England, the religious establishment most familiar and repugnant to the Founders, was an "internal operation" of the state ever since the Supremacy Act of 1534. 1 W. Holdsworth, *A History of English Law*, at 597 (7th ed. 1966) (through the Tudor settlement, "[t]he church had been brought within the state; and subjected to the power of the crown.").

No reading of the Establishment Clause that does justice to history, and to the abuses of power the Founders intended to prevent, could possibly conceive that the Executive Branch could have unfettered authority to support religion, inside or outside the government, and to insulate such support from a judicial challenge by injured taxpayers. The Founders did not intend to install Henry VIII in the White House.

IV. IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THIS CASE DOES NOT RAISE THE QUESTION PRESENTED

The question presented by Petitioners is whether taxpayers have Article III standing to bring an Establishment Clause challenge "to the actions of Executive Branch officials pursuant to an Executive Order, where the conduct is financed only *indirectly* through general appropriations legislation." Pet. Br. I (emphasis added). This question was framed based on the erroneous assumption that Congress did not intentionally fund the Faith-Based Initiatives or the Faith-Based Centers supporting those Initiatives.

The court of appeals also erroneously concluded that the question presented was whether a taxpayer can have

Article III standing to challenge an alleged violation of the Establishment Clause "unless Congress has earmarked money for the program or activity that is challenged." Pet. App. 1a. The court of appeals presumably fashioned the question in such terms because the full legislative record was not developed below:

> There [was] no suggestion that these are appropriations earmarked for these conferences, or for any other activities of the various Faith-Based and Community Initiatives programs, or for a statute pursuant to which the programs were created.

Id. at 11a.

As demonstrated above, Congress *did* specifically intend that the activities of the Faith-Based and Community Initiatives programs be funded by its appropriations. Based on the legislative record, this case is governed squarely by *Flast* and *Bowen* and the Court should find standing under those precedents. In the alternative, because the question presented and the decision below were premised on an incomplete record, *Amici* respectfully suggest that the writ of certiorari be dismissed as improvidently granted. *See Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (dismissing writ as improvidently granted once it became apparent that "the question framed in the petition for certiorari is not in fact presented by the record now before us").

CONCLUSION

For all the foregoing reasons, this Court should either affirm the conclusion of the court of appeals that standing in this case is consistent with this Court's holdings in *Flast* and

Bowen or, in the alternative, dismiss the writ of certiorari as improvidently granted.

RONALD A. LINDSAY
CENTER FOR INQUIRY
621 Pennsylvania Ave., S.E.
Washington, DC 20003
(202) 546-2332

IRVIN B. NATHAN
Counsel of Record
DANIEL S. PARISER
SONIA K. PFAFFENROTH
ETHAN P. GREENE
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Dated: February 2, 2007

Counsel for Amici Curiae

FILED
JAN - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

GREGORY S. BAYLOR
(Counsel of Record)
STEVEN H. ADEN
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

I. The Nature of the Establishment Clause 2

II. *Flast* Taxpayer Standing 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Abington School District v. Schempp, 374 U.S. 203 (1963) 7

Americans United for Separation of Church and State v. Valley Forge Christian College, 454 U.S. 464 (1982) 12

Board of Education v. Allen, 392 U.S. 236 (1968) 2

Bowen v. Kendrick, 487 U.S. 589 (1988) 12

Clinton v. City of New York, 524 U.S. 417 (1998) 9

Edwards v. Aguillard, 482 U.S. 578 (1987) 8

Engel v. Vitale, 370 U.S. 421 (1962) 7

Epperson v. Arkansas, 393 U.S. 97 (1968) 8

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 7

Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*

Freedom From Religion Foundation v. Chao, 433 F.3d 989 (7th Cir. 2006) 12

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 9

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ... 7

Lemon v. Kurtzman, 403 U.S. 602 (1971) 6

Lynch v. Donnelly, 465 U.S. 608 (1984) 7

McCollum v. Board of Education, 333 U.S. 203 (1948) 5

McDaniel v. Paty, 435 U.S. 618 (1978) 6

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 8

Tilton v. Richardson, 403 U.S. 672 (1971) 2

Torcaso v. Watkins, 367 U.S. 488 (1961) 8

United States v. Richardson, 418 U.S. 166 (1974) 8

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 5, 6

Constitution & Rules

U.S. CONST. amend. I ..... *passim*

U.S. CONST. art. VI, § 3 6

FED. R. CIV. P. 12(h)(3) 9

Other Sources

Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000) 7

Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385 (2004) 3

Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445 (2002) 3, 5

Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) 2, 5, 6, 10, 11

Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968) 10

Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1 (1933) 3

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997) 4

JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY (3d ed. 2003) 3

INTEREST OF *AMICUS CURIAE**

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

---

* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

Amicus joins Petitioners in urging this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Understanding *Flast v. Cohen*, 392 U.S. 83 (1968), and its holding with respect to taxpayer standing first requires understanding the nature of the Establishment Clause. *Flast*'s double-nexus test[1] has never been satisfied outside the Establishment Clause context.[2] There is a good reason for that development, one with which *Amicus* agrees.

I. The Nature of the Establishment Clause.

The Establishment Clause is structural in character. Or, more precisely, since the mid-20th Century it has come to be regarded as such by this Court. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). As such, the no-establishment principle is about the separation of church and state or, more specifically, the clause is about properly ordering relations between church and state.

---

[1] 392 U.S. at 102.

[2] For example, this Court has twice rejected taxpayer claims brought under the Free Exercise Clause. *See Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (taxpayers lacked the requisite burden on religion); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968) (same). The determinations in *Tilton* and *Allen* were sound.

The work of the modern Establishment Clause is thus to keep in proper relationship two centers of authority, government and organized religion. That development ought to come as little surprise because the dual-authority pattern of state and church[3] has been part of the Western legal tradition since the Fourth Century.[4] American jurisprudence, standing as it does in the stream of Western civilization, could not help but have as a presupposition of its fundamental laws an ordering of relations between church and state.[5]

To be sure, the precise location of the line between church and state in Western history has

---

[3] JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY 1-10 (3d ed. 2003). "So there were two, Priest and prince, or church and state, each needed the other, but both were separate aspects of one society. This separated double authority structure is what marked off Western Christendom from Eastern Christianity, and it properly locates the significance of 'church and state.'" *Id.* at 3-4.

[4] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 445-53 (2002); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1391-94, 1576-92 (2004).

[5] Lecturing on comparative law, Roscoe Pound, then Dean at Harvard Law School, was identifying those received precepts, those assumed starting points, those presuppositions from which Western law unconsciously draws. One such fundamental principle in the West is that church and state have long been regarded as distinct centers of authority: "In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of temporal sovereign, that is, of a politically organized society, was fundamental." Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933).

always been disputed, with the government sometimes dominating the church and the church sometimes dominating the government. But what is not contested in the Western legal tradition is that — wherever one draws that line — there are two centers of authority, each with its own purview. In the United States, unlike with the various European models, the additional step of disestablishment was taken, essentially a deregulation of the specifically religious sphere.[6]

By observing that the Establishment Clause is "structural," *Amicus* means that the task of the Establishment Clause is to police the boundary between government and organized religion. This proper ordering of church-state relations is to the mutual benefit of both the body politic and organized religion.[7]

---

[6] Historian Jack Rakove writes:

> [James] Madison and [Thomas] Jefferson were not mere tolerationists; they countenanced a constitutional solution to the religion question, renouncing the authority of the state to regulate the one aspect of behavior that had most disrupted the peace of society since the Reformation. For at the heart of their support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, placed beyond the cognizance of the state, and thus defused as both a source of political strife and a danger to individual rights.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997).

[7] Statements observing such reciprocity are common in this Court's cases. *See, e.g.*, *McCollum v. Board of Education*, 333

That the Supreme Court has regarded the Establishment Clause as ordering relations between church and state is manifest in this Court's case law in six or seven different ways. *See* Esbeck, *supra* note 4, 18 J.L. & POL. at 456-71 (relaxed standing rules; awarding of remedies for harms other than religious harm; awarding class-wide remedies, not just relief for the claimants before the court; dismissals of claims for lack of subject matter jurisdiction; two definitions of religion, one for the Free Exercise Clause and one for the Establishment Clause, reflecting the different purposes of each clause; the awarding of remedies that protect organized religion from its own harmful choices).

One of the most telling validations of the structural character of the Establishment Clause is the special standing rule in *Flast v. Cohen*. *See* Esbeck, 84 IOWA L. REV. at 33-40.

Broadly speaking, the Establishment Clause is about preventing two types of harms: (a) prohibiting the government from embracing a specifically religious doctrine or observance that then causes division within the body politic along religious lines (often dubbed "political divisiveness along religious

---

U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

lines")[8]; and (b) prohibiting entanglement by the government and other intrusions into religion that cause harm to the internal freedom of religious organizations (often dubbed "church autonomy"). *See* Esbeck, 84 IOWA L. REV. at 60-63. That church-state separation is a "two-way street," that is, it is to operate to the mutual benefit of both, is seen in the *Lemon* test ("primary effect that neither advances nor inhibits religion" and "no excessive entanglement")[9] and the endorsement test (government is restrained from "communicating a

---

[8] Care must be exercised so that "divisiveness avoidance" does not slop over and violate the Free Speech Clause or the right of Expressive Association. *See McDaniel v. Paty*, 435 U.S. 618, 640-42 (1978) (Brennan, J., concurring in the judgment). Public disputes over the application of religious beliefs to political issues are common in a democracy. At the time of the American founding, republics were still experimental and thought unstable. The founders knew, for example, how sectarian division caused the English Commonwealth (1649-58) to fail. They believed that for a nation-state to take sides in disputes over creeds and other specific forms of religious observance was to dangerously risk dividing the body politic. Hence, for example, religious tests for public office were bad for republics. *See* U.S. CONST. art. VI, § 3 (". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). The founders believed that specifically religious questions were never properly within the government's temporal authority. *See Watson*, 80 U.S. (13 Wall.) 679 (no civil court jurisdiction with respect to disputes over doctrine, polity, or discipline). But the focus of "divisiveness analysis" must be on the government alone and its specifically religious behavior, not on the expression of private speakers. The latter is fully protected by the Free Speech Clause.

[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

message of government endorsement or disapproval of religion").[10]

Whether an Establishment Clause plaintiff suffers religious harm is not a necessary element of an Establishment Clause claim. *Flast* taxpayer standing does not require a showing of such harm.[11] On numerous occasions, the Establishment Clause has provided redress for individual injuries other than religious harms. *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 317-18 (2000) (economic harm or loss of property;[12] constraints on academic freedom and inquiry by teachers and

---

[10] *See Lynch v. Donnelly*, 465 U.S. 608, 690 (1984) (O'Connor, J., concurring). The endorsement test is attributed to Justice O'Connor.

[11] This Court has long noted that religious coercion or individual harm does not always (and need not) attend a violation of the Establishment Clause. *See Abington School District v. Schempp*, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (same). This further validates that the nature of the no-establishment restraint is structural rather than being rights-based.

[12] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (economic harm to department store); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (economic harm to a tavern).

students;[13] and restraints on free-thinking atheists[14]).

When a structural provision in the Constitution is transgressed it is not uncommon for there to be no particularized "injury in fact."[15] Rather, the injury is a generalized grievance falling on a large part or all of the body politic. That the harm to a group of taxpayer-plaintiffs is generalized is unsurprising, for the Establishment Clause is structural, ordering and policing relations between the entities of government and organized religion. Hence, there will be occasions (not too uncommon) when the Establishment Clause is violated and no one suffers "injury in fact." This Court responded by adopting the double-nexus test of *Flast v. Cohen*. Had the Court not done so, the judiciary would be unable to address many Establishment Clause violations.

The structural character of the Establishment Clause is relevant to the question whether violations

---

[13] *Edwards v. Aguillard*, 482 U.S. 578 (1987) (public school teacher and students desirous of an expanded science curriculum); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same).

[14] *Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling in favor of atheist, who by self-profession had no religion and thus no harm to his religion, but who was desirous of holding public office without taking theistic oath).

[15] This happened in both *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). A rights violation is likely to produce a victim and lead to a particularized "injury in fact." When the government transgresses a structural boundary, a generalized grievance often occurs. That said, a structural violation can sometimes lead to a particularized injury. See *supra* nn. 12-14 for examples where a violation of the Establishment Clause did cause individual harm.

thereof can be waived. Although constitutional rights can be waived, violations of constitutional structure cannot be waived. This is because the Constitution's structure (better termed the "frame of government") is there to define and preserve the republic and thereby preserve the liberties of the entire body politic.[16] Because the constitutional frame of limited and divided government, with its checks and balances, is there to safeguard the liberties of all of us, no one litigant (especially the government) could waive it for all others comprising the body politic. This is illustrated by the line-item veto case, *Clinton v. City of New York*, 524 U.S. 417 (1998). One of the arguments by the government for the line-item veto legislation being constitutional was that Congress had enacted the statute and thus had waived its ability to later complain that the legislation wrongly shifted power to the Executive Branch. Justice Kennedy rejected the argument. He noted that there could be no waiver by Congress of the Constitution's separation of powers. That structure (or framework) is there to limit and check government, with the consequential effect of protecting the liberty of us all. *Id.* at 449-51 (Kennedy, J., concurring). In the same manner, a federal court's lack of subject matter jurisdiction is a restraint on the Judicial Branch's Article III authority that can never be waived by a party litigant. *See* Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (contrasting the rights-based limit on personal

---

[16] The Constitution's framework is not only for the protection of citizens. It protects everyone, alien or citizen, who comes within the jurisdiction of the United States of America.

jurisdiction as an "individual liberty" that can be waived with a structural restraint such as the limit on subject matter jurisdiction that is a "restriction on judicial power" and thus cannot be waived).

II. *Flast* Taxpayer Standing.

Flast taxpayer standing is a legal fiction. *See* Esbeck, 84 IOWA L. REV. at 35-36; Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 74 (1968) ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects."). A federal taxpayer does not have actual "injury in fact" when funds are appropriated from the U.S. Treasury in a manner that violates the Establishment Clause. Moreover, and relatedly, should the taxpayer prevail on the merits, the remedy is not a refund of a tiny part of his or her federal tax dollars.

Amicus does not characterize *Flast* taxpayer standing as a legal fiction to disparage the case. Rather, *Amicus* calls it a fiction merely as an apt description. Like all legal fictions, the fiction in *Flast* is instrumental. It is a legal fiction that a taxpayer-plaintiff has suffered an individual "harm" so as to permit adjudication of a putative transgression of the church-state boundary by the Legislative Branch that would otherwise go without review by the Judicial Branch. It is true, of course, that Congress could have second thoughts and go back and repeal the legislation claimed to improperly involve the government with organized religion. But that is unlikely.

Flast taxpayer standing can be justified because the structural restraint in the no-establishment principle is *sui generis*, that is, it is unlike other constitutional structure which either runs horizontal as between the three federal branches (*i.e.*, "separation of powers") or runs vertical as between the federal government and the governments of the several states (*i.e.*, "federalism").[17] When either separation of powers or federalism is transgressed, or arguably so, there will usually be some other governmental branch eager to defend against encroachment on its turf. Not so with many violations of the proper church-state boundary. For example, a religious organization receiving a grant out of general tax revenues (and the potentially entangling regulations that go along with the funding and that may compromise the faith) is not going to complain about the funding or the accompanying regulations, for the receipt of the funds was voluntary with the religious organization. Such behavior is normal and to be expected. *See* Esbeck, 84 IOWA L. REV. at 39-40, 62-63. Hence, the legal fiction has its utility.

Flast taxpayer standing requires more than a showing that the plaintiff is a federal taxpayer. *Flast* requires spending by Congress under its Article I, Section 8, Clause 1, Taxing and Spending

---

[17] Some argue that the Second Amendment is a structural reservation of power to the States concerning Militia, hence not an individual right concerning firearms. If so, it is a structural clause of the federalism sort. Thus perhaps the Establishment Clause is not viewed as the only structural provision in the Bill of Rights.

Power. There have been those who have argued for adopting a far broader legal fiction, namely citizen standing, so long as the underlying claim involves the Establishment Clause.[18]

While *Amicus* urges that *Flast v. Cohen* be reaffirmed, it does not urge that the scope of *Flast* be expanded. *Flast* has shown itself to be workable. It has not led to a vexatious number of lawsuits. It has not led to the Judicial Branch trenching into the authority reserved to the Legislative Branch.

Amicus agrees with the dissent by Judge Ripple in the case below, *Freedom From Religion Foundation v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006) (Ripple, J., dissenting), where he states that *Flast* by its terms is limited to instances where congressional appropriations are made (or grants are awarded) to private-sector parties.[19] *Flast* taxpayer standing should not be extended to situations where congressionally authorized discretionary spending is performed by agencies or officers of the Executive Branch—said to be done in a manner that violates the Establishment Clause. It can be plausibly argued that everything said or done by an officer or agency of the Executive Branch is made possible only by the expenditure of taxpayer monies. If all such Executive Branch actions were reviewable by the Judicial Branch with an eye to church-state

---

[18] *See, e.g., Flast*, 392 U.S. at 115-16 (Fortas, J., concurring) (stating that citizen standing would do).

[19] *Flast* was applied in *Americans United for Separation of Church and State v. Valley Forge Christian College*, 454 U.S. 464 (1982), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), but not expanded.

transgressions, that would hazard the Article III Branch superintending the day-to-day work of the Article II Branch. As stated above, *Flast* taxpayer standing is instrumental. *Flast* sought to do more good than harm. But if all Executive Branch utterances and actions are reviewable in a search for church-state boundary violations—and that at the behest of a private-sector taxpayer—then one would have a clear case of doing more harm than good.

There will be those who argue that any alleged structural violation of the no-establishment restraint should be justiciable in an Article III court. If *Flast* had gone that far, then anyone and everyone, citizen or resident alien, would have standing to bring an Establishment Clause claim of any character. The Court in *Flast* did not go that far; nor should it. The double-nexus test of *Flast* was designed to set limits on taxpayer standing that ensure the requisite clash of interests that makes the adversarial process work. The double-nexus test was the prudential stopping point to taxpayer standing. To expand the scope of taxpayer standing beyond *Flast* is to risk violating separation of powers with the Judicial Branch transgressing on the prerogatives reserved to the Executive Branch. That would be a little like destroying the village in order to save it.

CONCLUSION

Amicus requests that this Court reverse the United States Court of Appeals for the Seventh Circuit and order dismissal on the ground that the plaintiffs lack standing.

Respectfully submitted,

GREGORY S. BAYLOR
(Counsel of Record)
STEVEN H. ADEN
CENTER FOR LAW &
RELIGIOUS REEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070
Counsel for Amicus Curiae

January 4, 2007

(4)

No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,
Respondents.

On Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of *Amicus Curiae* Foundation for Moral Law, Inc., Suggesting Reversal

ROY S. MOORE
GREGORY M. JONES
(*Counsel of record*)
BENJAMIN D. DUPRÉ
FOUNDATION FOR MORAL LAW, INC.
Amicus Curiae
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

1. Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE STANDING OF THE PLAINTIFFS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS 3

II. THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT CONFER AN INDIVIDUAL RIGHT UPON WHICH A SUIT CAN BE FILED 5

A. The Establishment Clause protects states, not individuals 6

B. This Court has erroneously assumed that standing must be manufactured to ensure enforcement of the Establishment Clause 9

C. Adequate remedies exist for Establishment Clause violations 12

III. THE *FLAST* EXCEPTION AND *CHAO'S* EXPANSION OF IT EVISCERATE THE NATURE AND PURPOSE OF THE FUNDAMENTAL DOCTRINE OF STANDING 14

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Baker v. Carr, 369 U.S. 186 (1962) 12-13

Bowen v. Kendrick, 487 U.S. 489 (1988) 17

Colgrove v. Battin, 413 U.S. 149 (1973) 11

Colegrove v. Green, 328 U.S. 549 (1946) 12, 13

DaimlerChrysler Corp. v. Cuno, __ U.S. __, 126 S. Ct. 1854 (2006) 6, 13, 15, 19

Dimick v. Schiedt, 293 U.S 474 (1935) 19

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) 7, 8, 14

Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*

Freedom from Religion Foundation, Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006) 5, 11, 14-15, 16

Frothingham v. Mellon, 262 U.S. 447 (1923) 10

Gibbons v. Ogden, 22 U.S. 1 (1824) 4

Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005) 17, 18

Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840) 5

Lee v. Weisman, 505 U.S. 577 (1992) 8, 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 16

Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969) 16

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 13, 15, 20

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 3

McCreary County, Ky., v. ACLU of Kentucky,
545 U.S. 844 (2005).....10

Mississippi v. Johnson, 71 U.S. 475 (1866).....12

Myers v. Loudoun County Public Schools,
418 F.3d 395 (4th Cir. 2005).....7

Nixon v. United States, 506 U.S. 224 (1993).....12

Pacific States Telephone & Telegraph Co.
v. Oregon, 223 U.S. 118 (1912).....12

Reid. v. Colvert, 354 U.S. 1 (1957).....19

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974).....12, 18

School Dist. of Abington Township v. Schempp,
374 U.S. 203 (1963).....8

South Carolina v. United States,
199 U.S. 437 (1905).....3

Valley Forge Christian College v. Americans United
for Separation of Church and State, Inc.,
454 U.S. 464 (1982).....6, 9, 10, 12

Van Orden v. Perry, 545 U.S. 677 (2005).....8

Warth v. Seldin, 422 U.S. 490 (1975).....5-6

Winkler v. Chicago Sch. Reform Bd. of Trustees,
No. 99-C-2424 (Mar. 16, 2005 N.D. Ill.).....17

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 3 12

U.S. Const. Art. IV, § 4 12

U.S. Const. art. VI.....3

U.S. Const. amend. I 6

OTHER AUTHORITIES

Akhil Reed Amar, *The Bill of Rights* (1998) 8, 9

James Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* (Philip R. Fendall ed. 1865) 4

Mark A. Noll, *A History of Christianity in the United States and Canada* (1992) 7

II Joseph Story, *Commentaries on the Constitution* (1833) 6

Joseph Story, *A Familiar Exposition of the Constitution of the United States* (1840) 4

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the public display of the Ten Commandments, public aid to the Boy Scouts, and others that implicate the Establishment Clause of the First Amendment.

The Foundation has an interest in this case because it believes that religious freedom is best served by strictly adhering to the words of the Establishment Clause which preclude the plaintiffs' action in this case. Fundamental principles of our constitutional system are at stake in this case and the need for constitutional fidelity drives the Foundation's legal advocacy. This brief primarily focuses on whether the text of the Constitution should be determinative in this case; and whether a faithful reading of the text precludes the plaintiffs' action.

---

[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with letters of consent by counsel for both Petitioners and Respondents. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to decide *cases and controversies* based on the text of the document from which that authority is derived. A court forsakes its oath-bound duty when it rules based upon decisions that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its judgment of Establishment Clause jurisprudence.

Standing is a fundamental gate-keeping requirement designed to ensure that only properly redressable grievances are handled in courts of law. The doctrine implicitly recognizes that some offenses must be corrected by means other than litigation. Individual suits concerning violations of the Establishment Clause do not belong in the courts because the clause does not confer an individual right capable of vindication in the courts. Instead, the Establishment Clause is a federalism provision that seeks to protect the states' rights with regard to religion; breaches of it must be corrected by the Executive branch, the states, and the voting process.

This Court invented the exception in *Flast v. Cohen* out of whole cloth for the unnecessary purpose of ensuring supposedly proper enforcement of the Establishment Clause. This "*Flast* fiat" undermined the basic principles of standing doctrine and initiated a rash of litigation that has further twisted the meaning and purpose of the clause. The instant case continues the deterioration of standing principles through its extension of the *Flast* exception. The Court should abandon its misguided effort to ensure Establishment Clause enforcement and reinforce the historic parameters of the standing doctrine.

ARGUMENT

I. THE STANDING OF THE PLAINTIFFS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's incongruous standing precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this Court to return to the words of the United States Constitution in deciding cases.

Our Constitution dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution*—not a person, office, government body, or judicial opinion. *Id. Amicus* respectfully submits that the words of this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80.

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is

evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding these truths, the court of appeals below evaluated the issue of standing under the guise of a judicially fabricated taxpayer standing exception of *Flast v. Cohen*, 392 U.S. 83 (1968),[2] and thus it erred in concluding that the plaintiffs below possessed standing in this case.

II. THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT CONFER AN INDIVIDUAL RIGHT UPON WHICH A SUIT CAN BE FILED.

Members of Freedom From Religion Foundation filed this suit based on their status as taxpayers claiming a violation of the Establishment Clause. However, a proper interpretation of the text of the Establishment Clause does not provide a basis for this or any individual suit to enforce this provision of the First Amendment. This is so because the Establishment Clause does not confer a right upon individuals that is capable of vindication in the courts. Without such a right, the plaintiffs lack a "personal stake" in the outcome of this case. *See Warth*

---

[2] The court below openly admitted it was not following the original meaning of the words of the Constitution:

> The district judge . . . would have been correct in his thinking under an earlier view of Article III's limitation of the federal judicial power to deciding "Cases" and "Controversies." It was once thought that these terms . . . limited federal jurisdiction to cases in which the plaintiff alleged the kind of injury that would have supported a lawsuit in the eighteenth century. . . . The tangible harm to the taxpayer complaining of the expenditure was too attenuated to satisfy *eighteenth-century notions of standing embodied in Article III*.

Freedom from Religion Foundation, Inc. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006) (emphasis added).

v. Seldin, 422 U.S. 490, 498-99, (1975) ("[T]he standing question [tests] whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

"Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982). In fact, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, __ 126 S. Ct. 1854, 1860-61 (2006). Yet, in Establishment Clause cases this Court has bent over backwards to ensure that would-be plaintiffs receive a hearing in court without ever considering whether the Establishment Clause permits such suits.

A. The Establishment Clause protects states, not individuals.

The Establishment Clause of the First Amendment provides that: "**Congress shall make no law respecting an establishment of religion** . . . ." U.S. Const. amend. I. (emphasis added). Plainly read, this is a statement about Congressional power and jurisdiction regarding the area of religion, not a statement about an individual right. As Justice Joseph Story explained in his *Commentaries on the Constitution*: "The real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The Establishment Clause is distinctive for what it does *not* say in comparison to the other clauses of the First Amendment. The other clauses speak of the "free exercise" of religion, "freedom of speech," "freedom of . . . the press," the "right . . . to peaceably assemble," and the "right . . . to petition the government for redress of grievances." The Establishment Clause, in contrast, speaks only of a limitation on congressional power concerning what was at the time a common government institution, *i.e.*, establishments of religion. [3] "[U]nless we are to presume the 'founders of the United States [were] unable to understand their own handiwork,'" this difference in wording marks a difference in meaning. *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). That difference is a focus on federalism rather than individual rights. "The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging [particular] *freedom[s]*." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment).

The language of the Establishment Clause, then, dictates a two-fold focus: (1) the absence of congressional power concerning national church establishments and (2) a

---

[3] At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992).

prohibition on federal inference with state establishments.[4] "[T]he Establishment Clause was primarily an attempt to ensure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting). *See e.g., Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference))." The result is that the clause protects the states' rights concerning religion[5] while leaving concerns about individual rights regarding religion to the Free Exercise Clause.[6]

---

[4] The incorporation doctrine is not implicated in this case because the plaintiffs challenge federal rather than state action. Even so, incorporation does not affect the above reading of the Establishment Clause as some may claim it does. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2888 (2005) (Stevens, J., dissenting) ("It is this unique history [of the Establishment Clause], not incorporation writ large, that renders incoherent the postincorporation reliance on the Establishment Clause's original understanding"). Even if by judicial fiat the clause is amended to read "Congress *and the States* shall make no law respecting an establishment of religion," the language still does not confer an individual right of any kind because it solely addresses government power. Therefore, individuals could not bring suit to enforce the provision.

[5] "The original establishment clause, on close reading, is not antiestablishment but pro-states' rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally." Akhil Reed Amar, *The Bill of Rights* 34 (1998).

[6] This structural view of the Establishment Clause answers the criticism that the clause must concern more than the "'coercive' features and incidents of establishment," because otherwise it is a redundancy covered by the Free Exercise Clause. *Lee*, 505 U.S. at 621 (Souter, J., concurring). The Establishment Clause concerns "actual legal coercion," *Newdow*, 542 U.S. at 52 (Thomas, J., concurring), yet is not an "ornament

Thus far in its jurisprudence this Court has ignored the stark difference between the wording of the Establishment Clause and the wording of the "expressive rights" provisions contained in the rest of the Bill of Rights. Akhil Reed Amar, *The Bill of Rights* 34, 41 (1998). In essence, the assumption has been that all of the first nine amendments are talking about individual rights, but this is not true in the case of the Establishment Clause. It refers to a state right, which is the reason for the difference in wording. *See id.*, at 34. The failure to recognize this distinction has produced an unnecessary and illogical deviation in the legal standing requirements of Article III.

B. The Court has erroneously assumed that standing must be manufactured to ensure enforcement of the Establishment Clause.

This Court has started with the assumption that the Establishment Clause confers an individual right and from that assumption it has tried to divine ways in which to grant litigants standing to sue for alleged Establishment Clause violations. The results of this divination range from the implausible to the patently absurd. For example, ordinarily in order to possess standing under Article III, a plaintiff must allege a "concrete and particularized" injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge*, 454 U.S. at 485. In Establishment Clause litigation, however, plaintiffs need only demonstrate that the conduct at issue makes them feel like "'outsiders'" who are not "'full members

---

to the First Amendment" because the Clause is addressing a different subject than the Free Exercise Clause, *i.e.*, it deals with the federal/state relationship regarding religion while the Free Exercise Clause deals with federal action upon individuals regarding religion.

of the political community.'" *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 125 S. Ct. 2722, 2733 (2005) (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

Similarly, in general "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge*, 454 U.S. at 477. This is so because any alleged harm to the taxpayer is considered "comparatively minute and indeterminable; . . . and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain" that the complaint amounts to a generalized grievance. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). The court below admitted as much, observing that, "the tangible harm [to a taxpayer plaintiff] would often be zero because if the complained-of expenditure was enjoined, the money would probably be used to defray some other public expense that would not benefit the taxpayer, rather than returned to him in the form of a lower tax rate." *Chao*, 433 F.3d at 990. Yet in *Flast* this Court carved out an exception to this rule for Establishment Clause claims on the reasoning that "that clause of the First Amendment operates as a specific constitutional limitation upon the exercise of Congress of the taxing and spending power conferred by Art. I, § 8." *Flast*, 392 U.S. at 104 (footnotes omitted).

The problem with such a rationale, as Justice Harlan observed in his dissent in *Flast*, is that "[t]he Establishment Clause is . . . only one of many provisions of the Constitution that might be characterized in this fashion." *Flast*, 392 U.S. at 129 n. 18 (Harlan, J. dissenting). There is *nothing* in the wording of the Establishment Clause that specifically indicates it is peculiarly meant to curtail Congress's taxing and spending power. *See Flast*, 392 U.S. at 127 (Harlan, J. dissenting) (observing that "only in some Pickwickian sense are any of the provisions with which the Court is concerned 'specific(ally)'

limitations upon spending, for they contain nothing that is expressly directed at the expenditure of public funds."). That is a gloss the Court has placed upon the provision solely based on its selective reading of history.[7] *See Flast*, 392 U.S. at 103, 126.

This straining of logic and selective sifting of the historical record have been done "so that tax-and expenditure-based violations of the Establishment Clause do not go unremedied," a danger that seemingly exists "because of the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion." *Chao*, 433 F.3d at 998 (Ripple, J., dissenting). In other words, the *Flast* exception is an allowance made on the basis of a perceived shortcoming in the constitutional design. But expedience is no excuse for subverting constitutional principles.[8]

The Court is ignoring the import of the language of the Establishment Clause—which would deny its enforceability in the courts—because of a belief that there must be a litigation remedy for such an important constitutional provision. However,

---

[7] There certainly are characteristics of an "establishment" other than just financial support for a particular sect. At the very least it must also include the use of government force to compel certain beliefs or actions concerning religion. *See, e.g., Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was *coercion of religious orthodoxy* and of financial support by *force of law and threat of penalty*") (first emphasis added).

[8] "The Constitution is, in the end, a unitary, cohesive document and every time any piece of it is ignored or interpreted away in the name of expedience, the entire fragile endeavor of constitutional government is made that much more insecure." *Colgrove v. Battin*, 413 U.S. 149, 187 (1973) (Marshall, J., dissenting).

> [i]mplicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

Valley Forge, 454 U.S. at 490.

C. Adequate remedies exist for Establishment Clause violations.

Some constitutional provisions are non-justiciable and must be enforced by other means. "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[9] *Colegrove v. Green*, 328 U.S.

---

[9] Among those provisions that the Court has recognized as being not judicially enforceable are: the Guarantee Clause of Art. IV, § 4, *see Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); the Impeachment Clause of Art. I, § 3, *see Nixon v. United States*, 506 U.S. 224 (1993); and the duty that the laws must be faithfully executed, *see Mississippi v. Johnson*, 71 U.S. 475 (1866).

While the above examples specifically implicate the "political question" doctrine rather than the standing doctrine, they nonetheless illustrate that not all clauses of the Constitution are amenable to the judicial forum. "Each of these doctrines poses a distinct and separate limitation," yet, either "suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (citations omitted).

The Establishment Clause does not fit within the political question doctrine because cases that could arise under it do not contain the usual characteristics of a political question such as a lack of judicially discoverable or manageable standards for resolution or the potential for expressing a lack of respect for the coordinate branches of government. *See*

549, 556 (1946). Indeed, this is a key assumption behind the very idea of standing. "[T]he case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution." *Cuno*, 126 S. Ct. at 1861 (quoting *Valley Forge*, 454 U.S. at 474) (other citation omitted). Ignoring this idea—even when it concerns the First Amendment—undermines our constitutional model. As Justice Harlan astutely observed in his dissent in *Flast*:

> I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions" of the Constitution's several commands, but *neither can I suppose that such power resides only in the federal courts*. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Flast, 392 U.S. at 130 (Harlan, J. dissenting) (quoting *Missouri, Kansas & Texas R. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)) (footnotes omitted) (emphasis added).

"The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove*, 328 U.S. at 556. If Congress oversteps the boundaries of the Establishment Clause, it is the duty of the President to thwart the implementation of the unconstitutional congressional action. Because it is a specific federalism

---

Baker v. Carr, 369 U.S. 186, 217 (1962). In contrast, standing is a roadblock to Establishment Clause plaintiffs because the wording of the clause does not allow for individual enforcement of the provision; thus, it concerns whether such cases are appropriate for the judicial process. *See Lujan*, 504 U.S. at 560.

provision, states are also empowered to enforce the provision by bringing suits against the federal government under the clause. If both the federal executive and the states fail in their respective duties to ensure congressional fidelity to the Establishment Clause, the ballot box still remains as the ultimate enforcement of constitutional dictates.[10]

"Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but **does not protect any individual right**." *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment) (emphasis added). Without an underlying individual right, there can be no basis for standing to sue in this case.

Restraint counsels following the judicial oath of office by ruling according to the words of the Establishment Clause and permitting violations of its command to be redressed through these proper mechanisms of the tripartite system. The failure to do so has opened a judicial Pandora's Box that the ruling below exacerbates.

III. THE *FLAST* EXCEPTION AND *CHAO'S* EXPANSION OF IT EVISCERATE THE NATURE AND PURPOSE OF THE FUNDAMENTAL DOCTRINE OF STANDING

"The modern doctrine of constitutional standing was hardborn and has endured a difficult adolescence." *Chao*, 433

---

[10] As was mentioned in note 4, *supra*, this case does not require an examination of the incorporation doctrine because it involves federal actions. If the Establishment Clause is binding upon the states—a highly dubious proposition if it is interpreted as a federalism provision—then enforcement in the states would occur in the same manner as its federal counterparts, *i.e.*, governors must police the actions of state legislatures to ensure that no breach of the Establishment Clause is tolerated, and the people must police both branches in order to protect their religious freedom.

F.3d at 997 (Ripple, J. dissenting). This is a generous understatement. The fact is that while standing doctrine is designed as "a constitutional limitation of federal-court jurisdiction," *Cuno*, 126 S. Ct. at 1861 (citation omitted), the *Flast* exception has opened the door to a potential flood of litigation. That this case has come to this Court at all is a testament to the fact that it is now exceedingly difficult for courts to know who does and does not have standing because *Flast* jettisoned the "injury in fact" requirement to make way for a supposedly special exception brought about by the unique nature of Establishment Clause violations.

The purpose of ensuring that plaintiffs have proper standing is "to identify those disputes which are appropriately resolved through the judicial process." *Lujan*, 504 U.S. at 560. The *Flast* majority itself admitted that standing is designed to prevent potential plaintiffs from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government," and then it proceeded to obliterate that constitutional design by granting taxpayer standing for Establishment Clause plaintiffs. *Flast*, 392 U.S. at 106.

The only stipulation in *Flast* preventing a complete collapse in standing doctrine—at least when the Establishment Clause is implicated—was the requirement that the challenged action be linked to the Taxing and Spending Clause of Art. I, § 8 of the Constitution. This was not a particularly strong barrier to stopping the spread of standardless standing,[11] but the court

---

[11] There are other provisions in the Constitution that could just as legitimately be deemed limitations on Congress's spending power, including the Commerce Clause, the Due Process Clause of the Fifth Amendment, and the Tenth Amendment. The only discernable reason that the Court does not permit taxpayer standing to challenge actions under these provisions but does allow taxpayer standing in Establishment Clause cases is because it wants to do so. *See, e.g.*, *Flast*, 392 U.S. at 129 n.18 (Harlan, J. dissenting).

below side-stepped even that requirement in granting these plaintiffs standing. In so doing the court changed "the specter of a citizen bringing a lawsuit in a federal court to rectify an undifferentiated injury" into a present reality. *Chao*, 433 F.3d at 997-98 (Ripple, J., dissenting).

Flast's impact on Establishment Clause jurisprudence was felt almost immediately—and most significantly—in the watershed case of *Lemon v. Kurtzman*. This Court never grappled with the standing issue in its well-known opinion,[12] but the trial court in *Lemon I* certainly did, relying solely on *Flast* to determine that plaintiff Alton Lemon had standing as a taxpayer "to challenge the Education act under the establishment and free exercise clauses of the First Amendment." *Lemon v. Kurtzman*, 310 F. Supp. 35, 42 (E.D. Pa. 1969). The court noted that Lemon was suing as a *state* taxpayer and that *Flast* "concerned itself with the status of a federal taxpayer," but dismissed this distinction, justifying its expansion of *Flast* on the ground that "the First Amendment applies to State governmental powers." *Id.* at 41 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). Thus, the *Flast* exception made quick work of paving the way for *Lemon*, the case that, more than any other, has doggedly defined (and some would say confused) Establishment Clause jurisprudence for the past 34 years.

---

[12] This Court in *Lemon I* never discussed why (or whether) Lemon or the other individual plaintiffs had standing, merely noting that the trial court found Lemon had standing and recounting these facts about him:

> Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track and thus had paid the specific tax that supports the expenditures under the Act.

403 U.S. 602, 611 (1971). The Court's reference to Lemon's having "paid the specific tax" at issue in the case may have been as significant to the Court as it was to the trial court's analysis under *Flast*.

In *Bowen v. Kendrick*, this Court upheld the standing of federal taxpayers who challenged grants by a federal agency to religious institutions, pursuant to an act of Congress, for services relating to adolescent sexuality and pregnancy. 487 U.S. 489 (1988). The *Bowen* Court considered there to be "no dispute that [plaintiffs had] standing to raise their [facial] challenge," noting that it has "consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham v. Mellon*." *Id.* at 618 (citation omitted). *Flast* gave the taxpayers in *Bowen* the standing exception that they otherwise would not have had.

Flast continues to open its unique courthouse door to taxpayer plaintiffs in cases currently in the federal appellate system. Besides the instant case, the Seventh Circuit Court of Appeals has before it two recent cases brought by taxpayer-plaintiffs who relied on *Flast* for standing. In *Winkler v. Chicago School Reform Board of Trustees*, federal taxpayers sued the Department of Defense and other agencies for expenditure of federal tax funds, pursuant to several acts of Congress, to support programs and events of Boy Scouts of America. No. 99-C-2424, Slip Op. at 1 (Mar. 16, 2005 N.D. Ill.). Although the defendants in *Winkler* argued that the acts at issue were passed pursuant to Congress's authority over the military and over federal property, the court held that the plaintiffs had standing because Congress had also acted pursuant to its taxing and spending power, thus slipping the plaintiffs through the *Flast* loophole in standing doctrine. *Id.*, slip op. at 11-25.

That same year, in a case also on appeal, a federal trial court in *Hinrichs v. Bosma* held that Indiana taxpayers had standing to sue the Indiana House of Representatives for "sectarian Christian prayers" often given by invited clergy at the opening of the House's sessions. 400 F. Supp. 2d 1103 (S.D. Ind. 2005). Although the court in *Hinrichs* relegated

Flast to a footnote, its analysis of standing in the case nonetheless tracks the *Flast* requirements for standing. The court explained that Indiana tax funds spent on mailings and thank-you letters to invited clerics were "measurable disbursements of governments funds,[13] occasioned solely because of the prayer practice," and were therefore "sufficient to support standing for the plaintiff-taxpayers who object to the practice supported by the expenditures." *Id.* at 1110. After its *Flast* footnote, the *Hinrichs* court—perhaps painting with too broad of a brush—states that "[a] state taxpayer can satisfy the standing requirement in an Establishment Clause case by showing that tax funds are expended on the challenged practice." *Id.* at 1111.

The *Hinrichs* court ordered the Indiana Speaker of the House to stop permitting sectarian prayers in the House, and the Speaker appealed. The Seventh Circuit denied a stay pending appeal and ruled, in part, that the Speaker was unlikely to succeed on his standing argument because taxpayer-plaintiffs had standing under *Flast* and its progeny. *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006). In both *Winkler* and *Hinrichs*, the taxpayer-plaintiffs were proper parties to suit only because of *Flast's* evisceration of constitutional standing principles.

It should not be surprising that once this Court unhinged Establishment Clause standing from the anchor of the Constitution it has floated into a vast sea of uncertainty. "The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S.

---

[13] The *Hinrichs* court's measure of disbursements associated with the prayers—letters, photographs, postage, webcasts, etc.—came to an estimated $448.38 for the 2005 session.

208, 227 (1974). And without even a pretext of a limitation on taxpayer standing for the Establishment Clause, the only safeguard against a plaintiff-free-for-all is this Court's say-so. To abandon basic standing principles changes this Court's proper limited role[14] into that of a "Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." *Flast*, 392 U.S. at 130 (Harlan, J. dissenting).

This Court has "no authority . . . to read exceptions into [the Constitution] which are not there." *Reid. v. Colvert*, 354 U.S. 1, 14 (1957). It has done so anyway through the *Flast* exception, leading lower courts to grab that exception take it further from the Constitution's standing principles, decimating this constitutional bulwark against judicial usurpation.

> [T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.

Dimick v. Schiedt, 293 U.S 474, 485 (1935).

This Court has a duty not to extend the dubious *Flast* exception because it will, without doubt, weaken the "landmark" principle of standing to the point that it is completely emptied of its constitutional meaning and purpose. *Lujan*, 504 U.S. at 560. This case presents the perfect platform for the Court to return consistency and coherence to the standing doctrine by not only reversing the decision below, but

---

[14] "As this Court has explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Cuno*, 126 S. Ct. at 1861 (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (other citation omitted).

also by closing the indefensible loophole that opened the door for these plaintiffs to bring such a generalized complaint.

CONCLUSION

For the reasons stated, this Honorable Court should not only reverse the decision of the Seventh Circuit Court of Appeals and deny standing to the plaintiffs in this case, it should also reverse *Flast v. Cohen* and hold that because the Establishment Clause concerns a jurisdictional prohibition rather bestowing an individual right, it is not meant to be vindicated via individual suits in courts of law.

Respectfully submitted,

ROY S. MOORE
GREGORY M. JONES
(*Counsel of record*)
BENJAMIN D. DUPRÉ
FOUNDATION FOR MORAL LAW, INC.
Amicus Curiae
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245

January 5, 2007

FILED
JAN 5 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-157

IN THE

Supreme Court of the United States

JAY HEIN, Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORODO, FLORIDA, MICHIGAN, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

Office of the Indiana
Attorney General
IGC ... Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
JULIE A. HOFFMAN
Deputy Attorney General

Counsel for the Amici States

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

Troy King
Attorney General
State of Alabama

John Suthers
Attorney General
State of Colorado

Bill McCollum
Attorney General
State of Florida

Michael A. Cox
Attorney General
State of Michigan

George J. Chanos
Attorney General
State of Nevada

Wayne Stenehjem
Attorney General
State of North Dakota

W.A. Drew Edmondson
Attorney General
State of Oklahoma

Henry McMaster
Attorney General
State of South Carolina

Greg Abbott
Attorney General
State of Texas

Robert F. McDonnell
Attorney General
Commonwealth of Virginia

Rob McKenna
Attorney General
State of Washington

QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. Under the Rule Announced Below, a Growing Number of State Programs Will Be Newly Vulnerable to Establishment Clause Challenges 4

II. Federalism Principles Preclude the Level of Federal-Court Supervision Over State Affairs Permitted by the Decision Below 7

III. *Flast* Is an Unsustainable Departure from the General Rule Against Taxpayer Standing and Should Be Overruled 14

A. *Flast* Cannot Be Reconciled with the Separation-of-Powers Principles that Otherwise Govern Federal-Court-Standing Limits 15

B. Overruling *Flast* Would Be Consistent with the Court's *Stare Decisis* Doctrine 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

ACLU-Ky v. Wilkinson, 701 F. Supp. 1296 (E.D. Ky. 1988) 12, 13

Agostini v. Felton, 521 U.S. 203 (1997) 28

Aguilar v. Felton, 473 U.S. 402 (1985) 29

Allen v. Wright, 468 U.S. 737 (1984) 10, 24

Am. Jewish Congress v. Vance, 575 F.2d 939 (D.C. Cir. 1978) 26, 27

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 24

Bailey v. Drexel Furniture, 259 U.S. 20 (1922) 20

Baker v. Carr, 369 U.S. 186 (1962) 16, 17

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) 18

Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) 8

Bowen v. Kendrick, 487 U.S. 589 (1988) 23, 24

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) 12

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 20

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 8

City of Boerne v. Flores, 521 U.S. 507 (1997) 20

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 3, 10

Coal. to End the Permanent Congress v. Runyon, 796 F. Supp. 549 (D. D.C.), *overruled by*, 971 F.2d 765 (D.C. Cir. 1992) 26, 27

Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394 (10th Cir. 1992) 11, 12

Crawford v. Washington, 541 U.S. 36 (2004) ...17, 18, 28, 29

DaimlerChrysler Corp. v. Cuno, __ U.S. __, 126 S. Ct. 1854 (2006). ..... *passim*

Doremus v. Bd. of Educ., 342 U.S. 429 (1952)....6, 11, 16, 20

Ex parte Levitt, 302 U.S. 633 (1937) 16

Ex parte Young, 209 U.S. 123 (1908) 8

Flast v. Cohen, 392 U.S. 83 (1968)..... *passim*

Freedom from Religion Found., Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) 12

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 24

Frothingham v. Mellon, 262 U.S. 447 (1923).....14, 16

Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by*, 312 U.S. 657 (1941).....20

Hans v. Louisiana, 134 U.S. 1 (1890).....8, 9

Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005).....7, 12, 27

Hinrichs v. Bosma, 2005 WL 3544300 (S.D. Ind. 2005).....13

Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006).....27

Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984) 10

In re U.S. Catholic Conference, 885 F.2d 1020 (2d Cir. 1989) 26

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 23

Laird v. Tatum, 408 U.S. 1 (1972) 24

Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006) 27

Lewis v. Casey, 518 U.S. 343 (1996) 24, 25

L.S.S. Leasing Corp. v. U. S. Gen. Servs. Admin., 579 F. Supp. 1565 (S.D.N.Y. 1984) 26, 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....24

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....15

McGowan v. Maryland, 366 U.S. 420 (1961).....18

Metzl v. Leininger, 57 F. 3d 618 (7th Cir. 1995) 12

Milliken v. Bradley, 433 U.S. 267 (1977) 13

Minn Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990) 12

Missouri v. Jenkins, 495 U.S. 33 (1990).....13

O'Shea v. Littleton, 414 U.S. 488 (1974).....10, 13

Ohio v. Roberts, 448 U.S. 56 (1980).....17, 18, 28, 29

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 17, 29

Planned Parenthood v. Casey, 505 U.S. 833 (1992).....25, 28, 29

Poe v. Ullman, 367 U.S. 497 (1961).....16

Printz v. United States, 521 U.S. 898 (1997).....20

Pub. Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976) 26, 27

Ring v. Arizona, 536 U.S. 584 (2002).....28

Rizzo v. Goode, 423 U.S. 362 (1976).....10

Sch. Dist. of Philadelphia v. Pa. Milk Mktg. Bd., 877 F. Supp. 245 (E.D. Pa. 1995) 27

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).....23, 26

Seminole Tribe v. Florida, 517 U.S. 44 (1996).....17, 28

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) 24

Stark v.St. Cloud State Univ., 604 F. Supp. 1555 (D. Minn. 1985) 13

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 24

Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000) 27

Taub v. Kentucky, 842 F.2d 912 (6th Cir. 1988) 11

United States v. Lopez, 514 U.S. 549 (1995) 20

United States v. Richardson, 418 U.S. 166 (1974) 23, 26

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 24

Van Zandt v. Thompson, 839 F.2d 1915 (7th Cir. 1988) 12

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) ..... *passim*

Vieth v. Jubelirer, 541 U.S. 267 (2004) 28

Walton v. Arizona, 497 U.S. 639 (1990) 28

Wamble v. Bell, 538 F. Supp. 868 (W.D. Mo. 1982) 27

Warth v. Seldin, 422 U.S. 490 (1975) 24

Winkler v. Chicago Sch. Reform Bd. of Trs., 2000 WL 44126 (N.D. Ill. 2000) 12, 13

Younger v. Harris, 401 U.S. 37 (1971) 8, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 ..... 19, 20, 21

U.S. Const. art. III, § 2, cl. 1 1

U.S. Const. amend. I 1

U.S. Const. amend. XI 8

U.S. Const. amend. XIV 9

STATE EXECUTIVE ORDERS

Ala. Exec. Order No. 21 (June 22, 2004), *available at* http://www.governorpress.state.al.us/pr/ex-21-2004-06-22.asp (last visited Jan. 4, 2007)..... 4-5

Ind. Exec. Order No. 05-16, 28 Ind. Reg. 1907 (Mar. 6, 2005) 5

N.J. Exec. Order No. 02-31, 34 N.J. Reg. 3411(a) (Oct. 7, 2002) 5

SCHOLARSHIP

Akhil Reed Amar, *The Bill of Rights* (1998).....25

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 17, 23

C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862 (1985).....9

Earnest J. Brown, *Quis Custodiet Ipsos Custodes? —The School Prayer Cases*, 1963 Sup. Ct. Rev. 1 2

James Wm. Moore, *et al.*, Moore's Federal Practice (3d ed. 1999) 23

Kenneth E. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973).....19

Louis Lusky, *By What Right* (1975).....22, 23

Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue under the Establishment Clause*, 11 Ga. St. U. L. Rev. 495 (1995) 19

Max Farrand, *The Records of the Federal Convention of 1787* (1911) 1

Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771 (2003) 25, 26

Papers of John Marshall (Charles T. Cullen ed.1984) 8

Writings of James Madison (Gaillard Hunt ed. 1901) 21

WEBSITES

2d Annual Governor's Faith & Community Based Resource Symposium, *Building Communities through Faith & Community Partnerships, available at* http://www.michigan.gov/documents/OCFBI2006 Faithbased-Symposium_163870_7.pdf (last visited Jan. 4, 2007) 5

State of California, Office of Governor, *Gov. Schwarzenegger Begins Festival of Lights Chanukah Celebration at the State Capitol, available at* http://gov.ca.gov/index.php?/press-release/4919/ (last visited Jan. 4, 2007) 5-6

Office of Faith-Based & Community Initiatives, *About Us, available at* http://www.in.gov/ofbci/about/index.html (last visited Jan. 4, 2007) 4

White House Office of Faith-Based & Community Initiatives, *Contact Information—State Liaisons, available at* http://www.whitehouse.gov/government /fbci/contactstates.html (last visited Jan. 4, 2007) 4, 6

INTEREST OF *AMICI CURIAE*

State officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions and/or programs on Establishment Clause grounds. From the states' perspective, vigilance concerning Article III standing is required to avoid turning federal courts into fora "in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U.S. 83, 106 (1968). Even more to the point, maintaining proper limits on federal-court standing is also necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006). And, as the Court confirmed in *DaimlerChrysler*, state-taxpayer plaintiffs have no better federal-court standing than federal-taxpayer plaintiffs. *See id.* at 1863-64.

For these reasons, the *amici* states, like the federal government, have a strong interest in ensuring that federal courts are limited to their proper judicial role, as justified by the text, history, and structure of Article III and the First Amendment, in adjudicating Establishment Clause cases.

SUMMARY OF THE ARGUMENT

A well-known episode of constitutional history is James Madison's failure to persuade the delegates in Philadelphia to vest power in a Council of Revision that would have had the specific duty of determining the constitutional validity of congressional acts. *See* 1 Max Farrand, *The Records of the Federal Convention of 1787* 21, 97-98, 108-10, 138-40 (1911); 2 Max Farrand, *The Records of the Federal Convention of 1787* 73-80 (1911). Instead, the Framers enabled federal courts to hear only "cases" and "controversies." *See* U.S. Const. art. III, § 2, cl. 1. With every expansion of those terms, however, "[t]here is every

reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government" and "go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting).

The rule announced by the Seventh Circuit in this case, which would permit taxpayers to challenge executive-spending decisions in addition to legislative decisions. It would then would move the Court incrementally closer to becoming a Council of Revision, but, in light of subsequent Establishment Clause incorporation, "one with even more power than in the rejected version, for it would thereby have a mechanism for a ready check on *state* as well as federal legislation." Earnest J. Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 Sup. Ct. Rev. 1, 16 (1963) (emphasis added).

When a federal-court plaintiff identifies no direct injury, general complaints about state-government fiscal decisions should be handled through political, rather than judicial, processes. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982). Undertaking judicial review based merely on a plaintiff's general interest in appropriate government expenditures improperly exalts judicial power over state governments as well as the other branches of the federal government.

The *amici* states urge the Court to consider how the decision in this case might affect state programs and other state activities. Many states, like the federal government, spend money from general appropriations on conferences—similar to the White House Office of Faith-Based and Community Initiatives conference at issue here—to educate religious (and other) groups about applying for and

administering government grants. In addition, state officials frequently participate in religious celebrations as part of their ceremonial duties. If taxpayers are permitted to challenge discretionary executive-branch expenditures on Establishment Clause grounds, any expenses that states incur when conducting these activities might become the subject of a federal-court lawsuit.

Expanding federal judicial power to supervise these state-government programs and activities would transgress important federalism principles. The Court has repeatedly relied on federalism concerns to resist invitations to expand federal-court authority over the states. The Court has invoked federalism when rejecting taxpayer standing to sue state officials, *see DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006), when rejecting specific equitable remedies against state officials, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983), and when discussing standing more generally. *See Valley Forge*, 454 U.S. at 476. So too, in this case, the Court should resist an invitation to expand federal-court standing in light of the impact the decision will have on co-sovereign state governments.

Finally, the time has come to overrule *Flast*, particularly if the Court cannot draw a distinction between that case and this one. *Flast* is starkly inconsistent with standing doctrine in other contexts, where the Court principally asks whether a claim invokes the traditional judicial function of remedying direct, genuine injuries of plaintiffs. In *Flast*, the Court ignored that question and asked only whether the plaintiff would make a good litigant (and offered no explanation why its two-part nexus test was suitable for even that inquiry). *See Flast*, 392 U.S. at 101-02. What is more, the Court in *Flast* found a "nexus" between the Establishment Clause and the Spending Clause only by way of a deeply flawed characterization of the original purposes underlying the Establishment Clause. *See id.* at 103-04. In short, *Flast* has

proven unworkable, and the Court's subsequent decisions have isolated it doctrinally. As a procedural ruling, *Flast* has not generated the sort of public reliance that can justify preserving it solely on grounds of *stare decisis*, so the Court should lay *Flast* to rest once and for all.

ARGUMENT

I. Under the Rule Announced Below, a Growing Number of State Programs Will Be Newly Vulnerable to Establishment Clause Challenges

Like the federal government, state legislatures routinely grant both specific and general appropriations to allow their executive officials to manage the day-to-day activities of the state and to execute various state-policy initiatives. State executives use both general and specific legislative appropriations to create, administer, and participate in programs and activities whereby religious institutions—along with wholly secular groups—benefit from taxpayer funds for purposes of carrying out secular functions.

At least 33 states, including Indiana, have faith-based liaisons or a state office for faith-based and community initiatives. *See* White House Office of Faith-Based & Community Initiatives, *Contact Information—State Liaisons*, *available at* http://www.whitehouse.gov/government/fbci/contactstates.html (last visited Jan. 4, 2007). Indiana's Office of Faith-Based and Community Initiatives, created to ensure that faith-based institutions have equal access to state and federal funding, provides training, technical assistance, and grants to community-based and faith-based organizations. *See* Office of Faith-Based & Community Initiatives, *About Us*, *available at* http://www.in.gov/ofbci/about/index.html (last visited Jan. 4, 2007). Many states have created similar offices by executive order. *See* Ala. Exec. Order No. 21 (June 22, 2004), *available at* http://www.governorpress.state.al.us/pr/ex-21-2004-06-22.asp (last visited Jan. 4,

2007); Ind. Exec. Order No. 05-16, 28 Ind. Reg. 1907 (Mar. 6, 2005); N.J. Exec. Order No. 02-31, 34 N.J. Reg. 3411(a) (Oct. 7, 2002).

To further the aims of these departments and other faith-based social programs, executive officials at all levels of state governments routinely give speeches and participate in public events in order to foster relationships with religiously affiliated groups. For example, in Michigan, Governor Granholm hosted the Second Annual Governor's Faith and Community Based Resource Symposium in August 2006 in order to cultivate relations between government offices and religious organizations in furtherance of various social programs. *See* 2d Annual Governor's Faith & Community Based Resource Symposium, *Building Communities through Faith & Community Partnerships*, *available at* http://www.michigan.gov/documents/OCFBI2006Faithbased-Symposium_163870_7.pdf (last visited Jan. 4, 2007). As shown in the addendum to this brief at Table A, similar examples arise in many other states.

State executives cannot organize, promote, and conduct events of this nature without spending state funds. Under the Seventh Circuit's expansion of the *Flast* doctrine, any expenditure of general appropriations on these initiatives would enable taxpayers to sue on Establishment Clause grounds. *See* Pet. App. 16a.

State executives also frequently find themselves participating in other types of taxpayer-funded events that have religious themes. State officials annually participate in religious holiday ceremonies and celebrations, such as lighting Christmas trees or Chanukah menorahs, along with other religiously affiliated events that likely involve expenditures of taxpayer dollars. For example, Governor Schwarzenegger recently participated in the thirteenth annual Chanukah celebration at the California state capitol. *See* State of California Office of the Governor, *Gov.*

Schwarzenegger Begins Festival of Lights Chanukah Celebration at the State Capitol, *available at* http://gov.ca.gov/index.php?/press-release/4919/ (last visited Jan. 4, 2007). The Governor joined Rabbis and leaders of Chabah, the Jewish organization that sponsored the event, to help illuminate the capitol menorah. *See id.* The Governor even spoke about the meaning of the holiday at a podium bearing his office's seal. *See id.* State executives across the country regularly participate in similar activities. *See* Addendum, at Table B.

Attendance by public officials at religious events has not generally been subjected to judicial scrutiny. At least in part, this is likely because such events are not funded by specific legislative appropriations. However, the fact that these events are often held on state property and involve the participation of state officials very likely means that *some* expenditure of taxpayer dollars occurs, at least insofar as the state provides the site, logistical support, or security. Indeed, it is reasonable to assume that officials are compensated by their states for time spent at such events. Incidental expenditures of this nature have previously been insufficient to warrant taxpayer standing. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968) (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). Under the rule provided below, however, minimal, routine expenditures by state executives from general legislative appropriations may now be subject to federal judicial oversight.

To be sure, the Seventh Circuit attempted to assuage concerns about such lawsuits by distinguishing "incidental" expenditures from those purposely directed to support religion. *See* Pet. App. 12a-15a. For example, the court distinguished the expenses in this case from government support of a State of the Union address where a President makes favorable references to religion. *See* Pet. App. 12a. That official speech, the court observed, would not give rise to taxpayer standing because "the cost to the government of

the preparations, security arrangements, etc., involved in a State of the Union address . . . would be no greater merely because the President had mentioned Moses rather than John Stuart Mill," and "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a.

Yet a Governor's Chanukah celebration—or Christmas tree lighting—might not qualify for the Seventh Circuit's "incidental-expenditures" exception because in those cases the official is participating in activities that consist *solely* of the religious activity alleged to violate the Establishment Clause. So, while this exception would shelter the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address, it arguably would not account for an armored limousine taking Governor Schwarzenegger to a Chanukah celebration—where the marginal cost of the alleged violation would self-evidently *not* be zero. *See* Pet. App. 14a. Thus, many state-government expenditures that are seemingly incidental to routine public appearances by elected officials may potentially be subject to federal judicial inquiry—if not outright control, *cf. Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1109-14 (S.D. Ind. 2005)—if the rule announced by the Seventh Circuit prevails.

II. Federalism Principles Preclude the Level of Federal-Court Supervision Over State Affairs Permitted by the Decision Below

The potential impact that permitting taxpayer standing in this case could have on state-government functions raises troubling federalism issues. As the Court acknowledged just last term, "[d]etermining that a matter before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp.*

v. Cuno, __ U.S. __, 126 S. Ct. 1854, 1860 (2006) (internal quotations omitted). Like principles of separation of powers, principles of federalism shape the limits of that role.

1. Just as federal courts scrutinize federal-taxpayer-standing claims in order to avoid creating a system whereby "'the other departments would be swallowed up by the judiciary,'" *id.* at 1861 (quoting 4 *Papers of John Marshall* 95 (Charles T. Cullen ed. 1984)), so too, federal courts must police state-taxpayer-standing claims to avoid swallowing state-government autonomy. The Framers and the citizens of the Founding Era took very seriously the idea that federal courts should not assume a supervisory role over state governments. When, shortly after ratification, the Court overstepped well understood Article III boundaries and permitted a private citizen of South Carolina to sue Georgia for damages in federal court, *see Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 440 (1793), Congress and the country responded quickly and decisively with the Eleventh Amendment. *See Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890).

The Eleventh Amendment, however, is not the only significant constitutional text for purposes of limiting federal-court oversight of state-government operations. The Court's observation that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), is particularly significant here. What the Eleventh Amendment presupposes is that states are sovereign and may not be sued—in federal court as elsewhere—without their consent. *See id.* State officials, of course, may be sued as proxies, *see Ex parte Young*, 209 U.S. 123, 159-60 (1908), but that does not silence the call for federal courts to exercise restraint when adjudicating state interests. *See, e.g., Younger v. Harris*, 401 U.S. 37, 40-41 (1971) (announcing the rule requiring federal-court abstention from interference with ongoing state-court

law-enforcement proceedings). When *Ex parte Young* applies, the most important protection states have against unjustified federal-court interference with state functions is Article III—the very provision whose silence on the matter was originally thought to preclude federal courts from adjudicating disputes brought by citizens against unconsenting states. *See Hans*, 134 U.S. at 10-21. Article III's general restriction of federal courts to adjudication of "cases" or "controversies" remains a critical component of the Constitution's preservation of state sovereignty.

Accordingly, "under our system of reserved state powers and delegated national powers . . . there [is no] persuasive reason to conclude that the role of the federal judiciary in relation to the representative branches of state government should be greater than with respect to those of the national government." C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 867 (1985). In fact, "[t]here is no principled or historical basis for concluding that the original Constitution, augmented by a Bill of Rights directed literally only to the national government, intended to confer a broader power of judicial review with respect to the actions of state officers than those of federal officers." *Id.* at 867 n.26.

Not even the history of the Fourteenth Amendment, which enabled Establishment Clause incorporation, supports subjecting states to more permissive standing rules. "[T]he history of the Civil War Amendments and the Reconstruction civil rights legislation provides no support for the conclusion that in subjecting the actions of state officers in violation of federal law to broadened federal judicial review and control, there was" also an intent "to alter the understood meaning of a justiciable case." *Id.*

In tune with these principles, the Court has consistently equated federalism concerns with separation-of-powers concerns when faced with a decision whether to expand

federal-court standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (drawing a direct analogy between federalism and separation-of-powers principles); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982) (stressing that Article III "is a part of the basic charter . . . which . . . provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals"). The Court has also relied on federalism principles when rejecting the justiciability of citizen lawsuits for injunctive relief against state officials based only on past conduct. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

Most recently, the Court in *DaimlerChrysler* acted on the notion that the vertical division of power represented by federalism, like the horizontal division of power among the branches of government at the national level, imposes limits on federal-court standing. *See DaimlerChrysler*, 126 S. Ct. at 1863 (observing that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers"). Conferring standing on state taxpayers who cannot show a direct injury would "interpose the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration, contrary to the more modest role Article III envisions for the federal courts." *Id.* at 1864 (quoting *Allen*, 468 U.S. at 760-61).

Nor does *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), represent any sort of departure from principles of federalism for purposes of state-taxpayer Establishment Clause challenges. While some lower federal courts have treated *Doremus* as in invitation to accord standing to all state taxpayers, *see, e.g., Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984), *Doremus* actually *forecloses* state-

taxpayer standing in federal court absent a current or imminent "good-faith pocketbook" injury. *See Doremus*, 342 U.S. at 434. In other words, a state taxpayer must have a claim for disgorgement of paid taxes from a state official—or a claim that a state official is about to deprive the taxpayer of money unlawfully through taxation—in order to sue that official in federal court *as a taxpayer*. *See DaimlerChrysler*, 126 S. Ct. at 1863-64. Of most significance for the present discussion, the Court in *Doremus* relied extensively on the relationship between the states and the federal government and noted that while state courts may entertain public-interest lawsuits brought by taxpayers, federal courts may not. *See Doremus*, 342 U.S. at 434.

2. Unfortunately, lower federal courts have been uneven in their respect for federal/state comity when considering standing arguments. Among those cases respecting federalism, *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988), held that a state taxpayer did not have standing to challenge a state statute authorizing the state to acquire and to finance land on behalf of a private corporation. The court observed that the separation-of-powers concerns that underlie limits on federal-taxpayer standing have "a counterpoint which should be considered when a state taxpayer seeks to have a federal court enjoin the appropriation and spending of a state government. Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an 'all federal' action." *Id.*

Likewise, the Tenth Circuit held that state taxpayers did not have standing to challenge the Governor's alleged use of taxpayer funds to oppose a voter initiative. *See Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992). The court observed that "when state taxpayers attack state spending in federal court," courts must carefully scrutinize whether the taxpayer has suffered the requisite injury because "the integrity of our government's

federalist structure" is at stake. *Id.* at 1403. "Unnecessary or abstract decisions by federal courts in cases where there is no case or controversy could unduly constrict experimental state welfare legislation and undermine local self-determination." *Id.*

Other federal courts, however, have seemingly shown less concern with federalism implications and have undertaken review of even pedestrian state-government activities that are not principally spending programs based only on the thinnest of taxpayer-standing rationales. By way of taxpayer standing, federal courts are now involved in reviewing state holidays, legislative practices, agency Boy Scout sponsorships, capitol grounds nativity scenes and monuments, and student-teacher arrangements, among other activities.[1] In one of these cases, a federal court actually

---

[1] *See, e.g., Metzl v. Leininger*, 57 F.3d 618, 618 (7th Cir. 1995) (state taxpayer had standing to challenge Good Friday state holiday); *Cammack v. Waihee*, 932 F.2d 765, 769-72 (9th Cir. 1991) (permitting taxpayers to challenge Good Friday as a state holiday); *Van Zandt v. Thompson*, 839 F.2d 1215, 1217 (7th Cir. 1988) (permitting taxpayers to challenge a resolution of the Illinois House of Representatives to convert space in the state capitol to a prayer room); *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1110 (S.D. Ind. 2005) (taxpayers had standing to challenge Indiana House of Representatives' legislative prayer); *Winkler v. Chicago Sch. Reform Bd. of Trs.*, 2000 WL 44126, at *8 (N.D. Ill. 2000) (allowing Illinois taxpayers to challenge state-agency expenditures to sponsor Boy Scouts); *Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969, 970-71 (W.D. Wis. 1996) (allowing state taxpayers to challenge Good Friday state holiday); *Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694, 696 (D. Minn. 1990) (allowing state-taxpayer challenge to statute allowing public-school students to take coursework at religious post-secondary institutions); *ACLU-Ky. v.*

permitted plaintiffs to proceed as *state* taxpayers under *Doremus* but not as *federal* taxpayers under *Flast*, even though both state and federal expenditures were at issue. *See Winkler*, 2000 WL 44126, at *8.

Such permissive treatment of state-taxpayer lawsuits undermines our federalist structure by involving federal courts in the daily functioning of state bureaucracies. The Court has repeatedly emphasized that federal courts must respect principles of federalism when cases portend judicial regulation of state programs. In *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), for example, the Court refused to impose a tax levy for purposes of desegregation, stressing that "[o]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *See also id.* at 58-59 (Kennedy, J., concurring) (categorically rejecting, on federalism grounds, the power of federal courts to mandate state-tax levies); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("[F]ederal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *O'Shea*, 414 U.S. at 500 (holding that the need for proper balance in the federalist system counsels restraint against granting injunctions against state officers administering state laws) (citing *Younger*, 401 U.S. at 46).

These same concerns apply in Establishment Clause cases, which increasingly threaten to put state-government bodies under federal-court supervision. *See, e.g., Hinrichs v. Bosma*, 2005 WL 3544300, at *2-7 (S.D. Ind. 2005)

Wilkinson, 701 F. Supp. 1296, 1298, 1302-03 (E.D. Ky. 1988) (holding state taxpayers had standing to challenge nativity scene at state capitol); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 n.2 (D. Minn. 1985) (finding state-taxpayer standing to challenge state university's student-teacher program).

(holding, in an entry on a post-judgment motion, that remedies available to state taxpayers are not limited to rectifying their injuries as taxpayers and that, therefore, the court had continuing jurisdiction to regulate how legislative prayers are conducted). Accordingly, the Court should reject the expansion of taxpayer standing invited in this case and continue to articulate how the special respect that federal courts owe to state governments as co-sovereigns limits federal-court jurisdiction.

III. *Flast* is an Unsustainable Departure from the General Rule Against Taxpayer Standing and Should Be Overruled

The Court could decide this case in favor of the government by recognizing that *Flast v. Cohen*, 392 U.S. 83 (1968), cannot be applied to cases challenging the discretionary use of general appropriations without abandoning the rationale that underlies it. As an exception to the general rule against taxpayer standing, *Flast* rests entirely on the notion that *legislative* decisions—not *executive* decisions—concerning spending for religious purposes are at the heart of Establishment Clause history. *See id.* at 102-03. This history does not support the rule announced by the Seventh Circuit in this case. *See* Pet. App. 16a.

On the other hand, if the Court is concerned about fidelity to the philosophical underpinnings of its Article III standing precedents, it should recognize that *Flast* itself departs from the principle that federal courts exist to redress injuries and not simply to enforce the Constitution by abstract decree. *See Frothingham v. Mellon*, 262 U.S. 447, 488-89 (1923). As Justice Harlan explained in his dissent in *Flast*, broad recognition of taxpayer standing allows plaintiffs to sue not really as injured taxpayers, "but as private attorneys-general." *Flast*, 392 U.S. at 119 (Harlan, J., dissenting). In such cases, "[t]he interests that [the taxpayer plaintiffs] represent, and the rights they espouse,

are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike." *Id.* at 119-20 (Harlan, J., dissenting). Thus, the Court should "come[] to grips" with the reality "that taxpayers' suits under the Establishment Clause are not in these circumstances meaningfully different from other public actions." *Id.* at 128 (Harlan, J., dissenting).

Because *Flast* cannot be squared with the limited judicial role of redressing concrete individual injuries, the Court should overrule it. Only by doing so may the Court avoid recurrent demands to explain why only *Establishment Clause* challenges to *Spending Clause* actions may be brought by the merely offended. *Cf. Daimler Chrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1864-65 (2006) (explaining why *Flast* does not apply to Commerce Clause cases).

A. *Flast* Cannot Be Reconciled with the Separation-of-Powers Principles that Otherwise Govern Federal-Court-Standing Limits

Flast has always been out of step with the rest of Article III standing doctrine, and subsequent cases have only exacerbated its isolation by stripping it of both jurisprudential and historical support as a proper embodiment of Article III values. By now, *Flast* has been exposed as a dead-end detour around legitimate Article III barriers to the use of federal judicial power.

1. From the moment the Court staked out its role reviewing acts of the other branches of government, it has been careful to limit itself to resolving cases where something concrete—some real-world personal injury—is at stake. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), the Court announced the doctrine of judicial review only *after* carefully explaining that "[t]he province of the court is, solely, to decide on the rights of individuals, not to

enquire how the executive, or executive officers, perform duties in which they have a discretion."

This understanding of the limitations on the judicial function animated the rejection of taxpayer standing in *Frothingham*. There, and in other cases prior to *Flast*, the Court spoke of standing in terms of the plaintiff's injury. *See Frothingham*, 262 U.S. at 487-89. Taxpayer interests are interests of the public, not of individuals, the Court observed, so to decide a constitutional issue without a plaintiff who suffered an individualized direct injury "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which we plainly do not possess." *Id.* at 489; *see also Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (stating that a plaintiff who cannot show direct injury and merely suffers in some indefinite way in common with others cannot invoke the powers of the federal courts); *Ex parte Levitt*, 302 U.S. 633, 636 (1937) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action" and "it is not sufficient that he has merely a generally interest common to all members of the public.").

Similarly, in *Poe v. Ullman*, 367 U.S. 497, 503-05 (1961), the Court dismissed a challenge to a Connecticut law prohibiting advice regarding contraception and contraceptive devices because the plaintiffs did not stand to suffer a direct injury. The Court observed that "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.* at 504; *see also Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (holding that voters alleged a

sufficient direct injury to support standing by alleging vote dilution).

2. *Flast* should be overturned because it does not follow the principles set forth in these cases. *Cf. Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), because it "departs from historical principles"); *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), because it "deviated sharply from our established federalism jurisprudence"). While acknowledging that *Frothingham* rejected taxpayer standing as inconsistent with the Article III conception of judicial power, *Flast* ultimately ignored it and other precedents when it disjoined standing from separation-of-powers concerns: "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast*, 392 U.S. at 100; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 891 (1983) ("Never before had the doctrine of standing been severed from the principles of separation of powers.").

The Court instead proceeded from the understanding that courts are concerned with standing only to ensure the parties will *litigate* a case properly. *See Flast*, 392 U.S. at 99-100. Quoting *Baker*, 369 U.S. at 204—where the plaintiff proved individual, if novel, injury—the Court in *Flast* opined that what was really important for standing was that the plaintiff had "'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast*, 392 U.S. at 99. In other words, standing was now about judicial utility, not judicial role. The Court supplied no rationale for this alternative foundation for the

rules of standing. *Cf. Crawford*, 541 U.S. at 62 (criticizing and overruling *Roberts*, 448 U.S. at 66, for "replac[ing] the constitutionally prescribed method of assessing reliability with a wholly foreign one").

Based on this radically recast predicate concern, the Court relied on a supposed "nexus" between taxpayers and the Congressional powers to tax and spend as evidence that the taxpayer plaintiff would be a sufficiently useful litigant. *See Flast*, 392 U.S. at 102-03. *Flast*, however, provided no real explanation as to how there is a "nexus" between taxpayer status and congressional *spending* (as opposed to *taxation*) or how any such "nexus" equates with "'concrete adverseness which sharpens the presentation of issues.'" *Id.* at 99. The Court cited only *McGowan v. Maryland*, 366 U.S. 420, 429-430 (1961), for the general proposition that "our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast*, 392 U.S. at 101-02. *McGowan*, however, was an appeal from a state criminal conviction for violation of Sunday closing laws. *See McGowan*, 366 U.S. at 429-32. The only "standing" issue had to do with the rights the criminal defendant could invoke once in court, not with whether he had suffered an injury sufficient to invoke Article III judicial power.[2]

---

[2] *McGowan* is a curious precedent for the *Flast* Court to have cited for the added reason that, if anything, it demonstrates how Establishment Clause challenges are available to others besides taxpayer plaintiffs. *See McGowan*, 366 U.S. at 422-23; *see also Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 240-41 n.5 (1968) (adjudicating an Establishment Clause challenge brought by a school board seeking a declaration that a state textbook law was unconstitutional and an injunction to prevent a state official from removing them if they did not enforce the law).

Commentators—including some who favor expanding access to federal courts—find only frustration in trying to reconcile *Flast* with the direct-injury requirement. One writer explains that if a plaintiff must have a personal stake in the outcome of litigation, *Flast* "become[s] incomprehensible, for the opinion devoted not one word to demonstrating Mrs. Flast's actual monetary stake as a taxpayer, and it is doubtful that the Court could have made such a demonstration." Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 661 (1973). Neither of the *Flast* standing requirements—(1) a nexus between status and claim and (2) a specific constitutional limitation on the exercise of the spending power—in any way "assure[s] the personal stake and concrete adverseness necessary to satisfy Article III requirements; there is simply no necessary connection between taxpayer status and the stake one has or feels in establishment issues." *Id.*; *see also Flast*, 392 U.S. at 119-20 (Harlan, J., dissenting); Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue under the Establishment Clause*, 11 Ga. St. U. L. Rev. 495, 496, 529-30 (1995) (urging broader standing, but stating that "the fact remains that a *Flast* plaintiff realistically has nothing more to gain from a lawsuit than the satisfaction of helping enforce the dictates of the Constitution").

3. Nor does *Flast* hold together on its own. For starters—to focus on the precise distinction at issue in this case—*Flast* does not countenance taxpayer lawsuits against *all* government spending, but only against spending that arises from use of the Article 1, § 8 Spending Clause power. In particular, the Court said, "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast*, 392 U.S. at 102. The only apparent rationale for this rule was the need to distinguish *Doremus*, where the Court ruled that general overhead expenditures were an insufficient basis

for a taxpayer lawsuit challenging daily Bible reading at a public school. *See Doremus*, 342 U.S. at 431.

Similarly, the decision to limit taxpayer challenges to those predicated on "specific constitutional limitations on the taxing and spending power" and not the *inherent* limits of that power appears to have been necessary to distinguish *Frothingham*, where the taxpayer-plaintiff alleged that a particular congressional expenditure lay beyond the power conferred by Article I, § 8.[3] *See Flast*, 392 U.S. at 104-05. At the same time, *Flast* distinguished *Frothingham*'s due-process claim only by undertaking the forbidden practice of adverting to the merits—or lack thereof—of such a hypothetical claim. *See id.* at 104-05. Thus, *Flast* apparently rests on a series of *ad hoc* distinctions from past cases rather than a set of coherent constitutional principles. *See id.* at 124 (Harlan, J., dissenting) (observing that the Court is "compelled simply to postulate situations in which such taxpayer plaintiffs will be 'deemed' to have the requisite 'personal stake and interest'").

---

[3] The *Flast* Court purported to distinguish Spending Clause challenges on the theory that in such cases taxpayers are really invoking the reserved-powers rights of states. *See Flast*, 392 U.S. at 104-05. This argument is not only seemingly at odds with the text of the Tenth Amendment (which reserves unenumerated powers to both the states "or to the people"), but also conflicts with earlier decisions of the Court. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 286 (1936); *Bailey v. Drexel Furniture*, 259 U.S. 20, 36 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 269 (1918), *overruled by*, 312 U.S. 657 (1941) (all permitting individuals to assert that Congress exceeded its enumerated powers). *Cf. City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *Printz v. United States*, 521 U.S. 898, 905 (1997); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (same).

An even deeper problem is the Court's asserted historical rationale for permitting taxpayers to bring Establishment Clause claims, but not claims based on other constitutional limits. The Court drew a connection between the Establishment Clause and the Spending Clause because "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. Continuing, the Court explained that

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

Id. (quoting 2 *Writings of James Madison* 183, 186 (Gaillard Hunt ed. 1901)).

This history, said the Court, means that "[t]he Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8." *Flast*, 392 U.S. at 104.

The logic embracing taxpayer lawsuits predicated on the Establishment Clause, but not on the inherent limits of the Spending Clause, thus proceeds as follows: (1) the "general powers" of Article I, § 8—including the Spending Clause—are not self-limiting; (2) Madison, in his role as "the leading

architect of the religion clauses of the First Amendment," was motivated by an intense objection to taxation in support of religious establishments; and (3) the Establishment Clause is, first and foremost, a limit on the Spending Clause.

Even setting aside the logical gap between historical offense at establishment *taxation* and lawsuits to prohibit establishment *expenditures*, each of these premises is false. The Court's rendition of constitutional history in *Flast* oversimplifies and misstates the reasons for Madison's support of the Bill of Rights and ignores his views concerning Congress's Article I, § 8 powers. Madison originally *opposed* adding a Bill of Rights as both unnecessary and potentially dangerous. *See* Akhil Reed Amar, *The Bill of Rights* 40 (1998). Specifically, Madison (like many of the Founders) was of the view that the power to establish a national church was not among those delegated to Congress by Article I, § 8, and an amendment specifically prohibiting it would imply powers that never existed. *See id.* at 41. A specific anti-establishment amendment to the Constitution, therefore, was not necessary to prevent Congress from encroaching on state-establishment prerogatives (which was the concern that originally justified the Establishment Clause). *See id.* What is more, when Madison ultimately changed his mind about the Bill of Rights for political reasons, he came to view the Establishment Clause as confirming extant limits *not* of the *Spending* Clause, but of the *Necessary and Proper* Clause. *See id.* at 40.

So, even assuming the validity of the two-part nexus test, *Flast* got it wrong about the Establishment Clause: There is no historical basis for inferring that Madison thought the Spending Clause to be unlimited or even that he meant for the Establishment Clause to limit it in particular. Accordingly, there is no basis for treating Establishment Clause lawsuits more liberally for purposes of standing than any other taxpayer lawsuits. *See* Louis Lusky, *By What*

Right 177 (1975) ("The mystifying question is how the *Flast* rule can be logically confined to *specific* limitations."); *see also* 15 James Wm. Moore, *et al.*, Moore's Federal Practice § 101.60[6][b] (3d ed. 1999) (arguing that *Flast* is a "constitutional *non sequitur*").

4. Since *Flast*, the Supreme Court has reunited standing with separation-of-powers concerns and, in so doing, has effectively left *Flast* behind as a withered husk limited to its own facts. *See* Scalia, *supra*, at 898 ("*Flast* has already been limited strictly to its facts . . . ."); *see also Korioth v. Briscoe*, 523 F.2d 1271, 1277 (5th Cir. 1975) (referring to the "fading *Flast* doctrine"). Indeed, it was not long after *Flast* that both *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 n.8 (1974), and *United States v. Richardson*, 418 U.S. 166, 171-174 (1974), re-established the primacy of *Frothingham* and rejected taxpayer standing.

The trend toward recognizing only traditional "Hohfeldian" plaintiffs, *see Flast*, 392 U.S. at 119 (Harlan, J., dissenting), continued in *Valley Forge*, where the Court rejected taxpayer standing to assert an Establishment Clause violation through a transfer of property to a religious group, underscoring the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982). And in *DaimlerChrysler*, the Court said that *Flast* has a "narrow application in our precedent" and is strictly limited to challenges to "congressional action under the taxing and spending clause." *DaimlerChrysler*, 126 S. Ct. at 1865.

It is important to observe that the bases for distinguishing *Flast* in *Richardson* and *Valley Forge*—*i.e.*, that something other than Congress's exercise of its spending power was at stake—"seem utterly irrelevant to what *Flast* sought to accomplish." Scalia, *supra*, at 898. Thus, while the Court has adhered to *Flast* as a matter of *stare decisis*, *see Bowen*

v. Kendrick, 487 U.S. 589, 618 (1988), it is equally clear that it has since rejected *Flast* as precedent for the proposition that standing is not a separation-of-powers concern. *See Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) ("*Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from."). The Court now consistently emphasizes that separation-of-powers and federalism concerns dictate adherence to the Article III injury-in-fact requirement. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615-16 (1989); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-90 (1973).

Thus, the Court has now made it crystal clear that plaintiffs must show that they are genuinely injured before invoking the power of the federal courts. Without such limits, the Court has cautioned, federal courts would become "'virtually continuing monitors of the wisdom and soundness of Executive action,'" which "'is not the role of the judiciary.'" *Allen*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). As Judge Easterbrook observed in his concurrence in the denial of rehearing *en banc* in this case, the different treatment of standing principles in *Flast* and in the Court's subsequent decisions appears to be "arbitrary" and "illogical." Pet. App. 62a (Easterbrook, J., concurring in the denial of rehearing *en banc*). There is no good reason to perpetuate this arbitrariness any longer.

B. Overruling *Flast* Would Be Consistent with the Court's *Stare Decisis* Doctrine

When the Court considers whether to overrule precedent, its decision "is customarily informed by a series of prudential and pragmatic considerations," including (1) "whether the rule has proven to be intolerable simply in defying practical workability," (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992).

Taking the last two considerations first, as discussed above, *see* Part III.A.4, *supra*, the Court repeatedly refuses to use—and even criticizes, *see Lewis*, 518 U.S. at 353 n.3—the *Flast* standard. *See also DaimlerChrysler*, 126 S. Ct. at 1864-65 (2006) (refusing to apply *Flast* to a taxpayer's Commerce Clause claim). Also, historical events must now be seen in a way that negates whatever justification *Flast* originally had. *See* Amar, *supra*, at 40-41 (reciting facts that cast doubt on the *Flast* Court's version of Establishment Clause history). The remaining two considerations—workability and reliance interests—also support abandoning *Flast*.

1. *Flast* has proven unworkable, as it is clear that lower courts are generally confused about how to apply it. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 835-40 (2003) (reporting uneven application of taxpayer-standing doctrine). This Court has had to correct erroneous lower-court applications of *Flast* several times. *See*

DaimlerChrysler, 126 S. Ct. at 1863-64; *Valley Forge*, 454 U.S. at 479-80; *Schlesinger*, 418 U.S. at 212; *Richardson*, 418 U.S. at 167-68. And even as far back as *Richardson*, Justice Powell stated that he would "lay to rest the approach taken in *Flast*" rather than "perpetuate the doctrinal confusion" it created. *Id.* at 180 (Powell, J., concurring).

Even more troubling, lower federal courts often treat the invocation of taxpayer status as an automatic pass from substantive standing analysis. *See, e.g., Coal. to End the Permanent Congress v. Runyon*, 796 F. Supp. 549, 551, 558 n.8 (D. D.C. 1992), *overruled by*, 971 F.2d 765 (D.C. Cir. 1992) (failing to address taxpayer standing); *L.S.S. Leasing Corp. v. U. S. Gen. Servs. Admin.*, 579 F. Supp. 1565, 1572 n.3 (S.D.N.Y. 1984) (failing to address standing). In a recent empirical study of federal-court taxpayer standing, Professor Nancy C. Staudt concluded that a federal-court plaintiff asserting state taxpayer standing has nearly a 50% chance of being granted standing without asserting a First Amendment violation, and a 63% chance regardless of the claim. *See* Staudt, *supra*, at 824.

When courts do address taxpayer standing, the decisions have shown that federal judges cannot agree on *Flast*'s meaning, as evidenced by the circuit conflict precipitating review in this case. *Compare* Pet. App. 1a-16a *with In re U.S. Catholic Conference*, 885 F.2d 1020, 1027-28 (2d Cir. 1989) (no taxpayer standing because alleged action or inaction by the IRS is not a challenge to Congress's taxing and spending power); *Am. Jewish Congress v. Vance*, 575 F.2d 939, 945 (D.C. Cir. 1978) (no standing when taxpayer plaintiffs can point only to the expenditure of funds by executive officials); *Pub. Citizen, Inc. v. Simon*, 539 F.2d 211, 214 (D.C. Cir. 1976) (executive spending does not fit the second requirement of *Flast*, that the enactment in question exceeded specific constitutional limitations imposed on Congress). *Flast* also frequently gives rise to *intra*-court disputes. *See* Pet. App. 16a-26a (Ripple, J., dissenting); 59a

(Flaum, J., concurring in the denial of rehearing *en banc*); 59a-62a (Easterbrook, J., concurring in the denial of rehearing *en banc*); 63a-66a (Ripple, J., dissenting from the denial of rehearing *en banc*); *Laskowski v. Spellings*, 443 F.3d 930, 939 (7th Cir. 2006) (Sykes, J., dissenting); *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (Magill, J., dissenting); *Am. Jewish Congress*, 575 F.2d at 949 n.7 (Spottswood, J., dissenting); *Pub. Citizen, Inc.*, 539 F.2d at 219 (McMillan, J., dissenting).

In addition, *Flast* has led to idiosyncratic results. At least until *DaimlerChrysler*, some federal courts allowed taxpayer standing for non-Establishment Clause claims. *See Coal. to End the Permanent Congress*, 796 F. Supp. at 551, 556-58 (First and Fifth Amendment challenge to Congressional franking privileges); *L.S.S. Leasing Corp.*, 579 F. Supp. at 1567 (NEPA challenge to the construction of government buildings); *Wamble v. Bell*, 538 F. Supp. 868, 869 (W.D. Mo. 1982) (Fifth Amendment challenge to government funding of religious schools); *Sch. Dist. of Philadelphia v. Pa. Milk Mktg. Bd.*, 877 F. Supp. 245, 248, 251 (E.D. Pa. 1995) (Commerce Clause challenge to state practice of setting milk prices).

More recently, an Indiana federal court relied on minute expenses for correspondence, photos, and webcasting to regulate, at the behest of a few state taxpayers, prayers in the Indiana House of Representatives. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1109-14 (S.D. Ind. 2005); *see also Hinrichs v. Bosma*, 440 F.3d 393, 396-98 (7th Cir. 2006) (denying stay of district court's injunction pending appeal based in part on a preliminary determination that the district court reached the correct decision on taxpayer standing). And the Seventh Circuit has ruled that state taxpayers may sue government grant recipients to disgorge funds received as part of a program that violates the Establishment Clause, even where the grant has expired and the government does not want the money. *See Laskowski*, 443 F.3d at 933-34.

These discomfiting trends demonstrate that lower federal courts find the logic of *Flast* inscrutable—and therefore unworkable—as a constitutional standard. The source of their confusion is as obvious as it is resilient. As discussed in Part III.A., *supra*, *Flast* is, and has been from the very beginning, incomprehensible both as an exegesis of Article III principles and on its own terms. Because *Flast* has no serious historical or jurisprudential rationale, it is no wonder that the test it fabricated has proven elusive in practice. This is an exceedingly important reason to overrule *Flast* now. *Cf. Seminole Tribe*, 517 U.S. at 64 ("Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to apply the deeply fractured decision.").

2. As to the collateral ramifications of overturning *Flast*, it is implausible that *Flast* has induced special reliance on its generous federal-court-standing rule. In fact, "it is hard to imagine" how anyone could rely on *Flast* in any meaningful way or how any reliance "could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004).

In this regard, it is important to bear in mind that, while Article III standing rules implicate constitutional norms, they are still procedural rules. Standing rules do not, for example, embody substantive rights concerning individual autonomy. *See Casey*, 505 U.S. at 847-51. In the recent past, the Court has overturned multiple precedents concerning constitutional procedural norms. *See Crawford*, 541 U.S. at 60-62 (overruling *Roberts*, 448 U.S. at 66); *Ring v. Arizona*, 536 U.S. 584, 608-09 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Seminole Tribe*, 517 U.S. at 64 (overruling *Union Gas*, 491 U.S. at 1). Even with respect to Establishment Clause issues, the Court has not been deterred by reliance interests from overturning prior decisions. *See Agostini v. Felton*, 521 U.S. 203, 208-09 (1997) (overruling

Aguilar v. Felton, 473 U.S. 402 (1985)). In short, with respect to *Flast*, there are no noteworthy reliance interests to add to the "cost of repudiation." *Casey*, 505 U.S. at 854.

* * * *

It may be that the Court can reverse the decision below simply by distinguishing this case from *Flast*. However, if the Court discerns no real justification for, or end to logic of, *Flast*—or if the Court concludes that it *cannot* distinguish *Flast*—this case presents an opportunity to reject it entirely. *See Crawford*, 541 U.S. at 60-62 (overruling *Roberts*, notwithstanding the ability to distinguish it). The Court should apply standing rules in Establishment Clause cases that, as in other areas of constitutional litigation, are consonant with the limited role of federal courts as remediators of genuine individual injuries.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
JULIE A. HOFFMAN
Deputy Attorney General

Counsel for the Amici States

Dated: January 5, 2007

ADDENDUM

Table A

State Conferences Where Faith-Based Groups Learn to Apply For and Administer Government Grants

State	Event	Citation
Alaska	Faith-Based & Community Initiatives Conference	http://ltgov.state.ak.us/fbci/conference.php
Alabama	Grant and Funding Resource Conference	http://www.servealabama.gov/PDFs/Faith%20Based%20Loop/issue%20I%20volume%20IX%20correction.pdf
Arkansas	Foundation for the Mid South 2nd Annual Pastoral and Community Leadership Conference "The Power of Entrepreneurial Faith"	http://www.arkansas.gov/faith/events.html
Hawaii	Hawaii Faith-Based and Community Initiative Conference	http://starbulletin.com/2005/10/18/news/story05.html
Indiana	2006 Faith Based Conference "A Challenge to Excellence"	http://www.in.gov/ofbci/events/sept06.html
Maryland	Second Local Government Grants Conference	http://www.gov.state.md.us/grants/jan06conf.html

State	Event	Citation
Michigan	Faith-Based Resource Symposium	http://www.michigan.gov/ documents/OCFBI-2006-Faithbased-Symposium_163870_7.pdf
Missouri	Community and Faith-based Employment Initiative Presented at Governor's Conference on Workforce Development	http://ded.mo.gov/cgi-bin/dispress.pl?txtpressid=1778
New Jersey	Annual Faith and Community Based Resource Expo	http://www.nj.gov/state/faith/acc2.html
Ohio	"Promising Partnerships Conference" sponsored by the Governor's Office of Faith-Based and Community Initiatives	http://governor.ohio.gov/releases/Archive2004/102704faith.htm
Texas	29th Annual Governor's Volunteer Leadership Conference	http://www.onestarleadership.com/onestar/events/

Table B

Religious Events Attended by State Officials

State	Official	Event	Citation
Alabama	Governor	"Every Light a Prayer For Peace" Christmas Tree Lighting	http://www.governorpress.alabama.gov/pr/pr-2006-12-01-04-christmas_tree-photo.asp
Arkansas	Secretary of State	Lighting State's Official Christmas Tree	http://www.sos.ar.gov/holidays2006/index.html
California	Governor	Lighting of Capitol Menorah; 75th Annual Capitol Christmas Tree; "Miracle on First Street Toy Giveaway"	http://gov.ca.gov/index.php?/press-release/4919/; http://gov.ca.gov/index.php?/fact-sheet/4858/; http://gov.ca.gov/
Georgia	Governor	Governor to light "Christmas Tree"	http://www.gov.state.ga.us/press/2006/press1304.shtml
Hawaii	Governor	Menorah Lighting	http://www.hawaii.gov/gov

State	Official	Event	Citation
Idaho	Governor	Annual Capitol Christmas Tree Lighting Ceremony	http://gov.idaho.gov/mediacenter/press/pr2006/prnov06/pr_143.html
Illinois	Governor	Christmas Tree Lighting Ceremony	http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=5589
Iowa	Lieutenant Governor	Holiday Tree Lighting Ceremony	http://www.governor.state.ia.us/news/2004/november/november2404_1.html
Louisiana	Governor and Secretary of State	Third Annual Candle Light Vigil; Christmas Lighting Ceremony	http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=1620; http://www.sos.louisiana.gov/admin/press/p110701-osc.HTM
Massachu-setts	Governor And Lieutenant Governor	Christmas Tree Lighting	http://www3.whdh.com/news/articles/local/BO36962/
Michigan		Capitol Christmas Tree	http://www.lsj.com/apps/pbcs.dll/article?AID=/20061130/NEWS04/611300345/1005/news04

State	Official	Event	Citation
Montana	Governor	Holiday Tree Lighting	http://governor.mt.gov/news/pr.asp?ID=403
Nevada	Governor	Christmas Tree Lighting	http://nv.gov/2006ChristmasLighting/index.htm
North Carolina	Governor	Christmas Tree Lighting	http://www.ncdcr.gov/news/2006/HS11_30_2006.asp
North Dakota	Governor	State Christmas Tree Lighting	http://www.state.nd.us/arts/newsletters/press_releases.htm
Ohio	Governor	Statehouse Tree Lighting Ceremony	http://governor.ohio.gov/section4-2.htm
Oregon	Governor	Capitol Tree Lighting Ceremony	http://www.leg.state.or.us/capinfo/cac_121806.html
Pennsylvania	Governor	Capitol Tree Lighting Ceremony	http://www.governor.state.pa.us/governor/CWP/view.asp?A=1115&QUESTION_ID=445231
Rhode Island	Governor	Annual Tree Lighting Ceremony	http://www.ri.gov/GOVERNOR/view.php?id=3082
South Carolina	Governor	Governor's Holiday Events	http://www.scgovernor.com/interior.asp?SiteContentId=20&pressid=42&NavId=93&ParentId=54

State	Official	Event	Citation
Utah	Governor	Christmas Lighting event	http://demo.utah.gov/firstlady/news/2005/news_12_0605.html
Vermont	Governor	Cuts Down Christmas Tree	http://www.vermont.gov/tools/whatsnew2/index.php?topic=GovPressReleases&id=1612&v=Article
Washington	Governor	Menorah Lighting Ceremony Tree Lighting Ceremony	http://www.atg.wa.gov/releases/2006/rel_GA_Decorations_122806.html
West Virginia	Governor	State Christmas Tree Lighting Ceremony	http://www.wvgov.org/joyfulnightgallery.cfm
Wisconsin	Governor	Lighting of Capitol Tree	http://www.doa.state.wi.us/news_detail.asp?onid=33

No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, et al.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR LEGAL AND RELIGIOUS HISTORIANS AND LAW SCHOLARS PAUL FINKELMAN, JOYCE APPLEBY, CARL T. BOGUS, ERWIN CHEMERINSKY, NORMAN DORSEN, RONALD B. FLOWERS, EDWIN S. GAUSTAD, STEVEN G. GEY, BETH SIMONE NOVECK, ROBERT M. O'NEIL, EDWARD A. PURCELL, JR., FRANK S. RAVITCH, NADINE STROSSEN, LAURA UNDERKUFFLER, AND SAMUEL L. WEBB AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN K. GREEN
WILLAMETTE UNIVERSITY
COLLEGE OF LAW
245 Winter Street, S.E.
Salem, Oregon 97301
(503) 370-6732

MATTHEW M. SHORS
(Counsel of Record)
GEOFFREY M. WYATT
ELI J. KAY-OLIPHANT*
AMBER TAYLOR**
ANNE CORTINA*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Admitted in N.Y. only. **Admitted in Cal. only.

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Framers Would Never Have Contemplated or Approved of Executive Spending in Furtherance of Religious Purposes. 5

A. The British Monarch Played a Vital Role in the Religious Establishment and Religious Persecution in England. 5

B. The Structural Design of the Constitution Foreclosed the Establishment of Religion by the Executive Branch. 9

1. The Framers Created a Government of Limited Powers 9

2. Structural Limitations on Executive Power Made "Establishment" Impossible. 9

3. Barring "Congress" from Establishing Religion Comprehensively Applies to the Federal Government. 14

(a) Correspondence 15

(b) The Debates. 16

II. The Framers Made No Distinction Between Tax Dollars Expended Internally or Externally For Religious Purposes. 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Flast v. *Cohen*
392 U.S. 83 (1968) 3, 4

Marsh v. *Chambers*,
463 U.S. 783 (1982) 26

Town of Pawlet v. *Clark*,
9 Cranch 292 (1815) 25

CONSTITUTIONS

U.S. Const. art VI, cl. 3 13

Del. Const. art. I (1792) 23

Ga. Const. art. IV, § 10 (1798) 23

Penn. Const. art. I (1790) 23

S.C. Const. art. XXXVIII (1778) 23

STATUTES AND LEGISLATIVE MATERIALS

Act of Dec. 23, 1791, ch. 3, 1 Stat. 226 11

Act of Mar. 14, 1794, ch. 6, 3 Stat. 342 11

Act of Feb. 5, 1796, ch. 1, 4 Stat. 445 11

1 *Annals of Congress* 729 (Joesph Gales ed., 1789) 17

3 *Annals of Congress* 983 (1793) 27

1 *Journal of the Continental Congress* 109 (Ford et al. eds., 1774) 8

Journal of the Senate of the Commonwealth of Virginia, Begun and Held in the City of Richmond, on Monday, the 18th of October . . . 1789 (Richmond, 1828) 18

TABLE OF AUTHORITIES, cont'd

Page(s)

BRITISH STATUTES

1 Eliz. 1, c.2 (1559) 6

13 Car. 2, st. 2, c.1 (1661) 6

25 Car. 2, c.2 (1672) 6

MISCELLANEOUS

William Blackstone, *Commentaries* 5, 6, 7, 11, 12

Richard Brown, *Church and State in Modern Britain, 1700–1850* (1991) 12

James A. Campbell, Note, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541 (2006) 7

J.C.D. Clark, *English Society 1660–1832* (2d ed. 2000) 7, 11, 12

Neil H. Cogan, *The Complete Bill of Rights* (1997) 18, 20

The Complete Anti-Federalists (Herbert J. Storing ed., 1981) 19

Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002) 15

Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 191 19

Documentary History of the First Federal Congress of the United States of America (L. Grant De Pauw ed., 1972) 17

TABLE OF AUTHORITIES, cont'd

Page(s)

Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. Church & St. 311 (2000) 17

Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385 (2004) 5, 7

Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998) 20

The Federal and State Constitutions (Francis Newton Thorpe ed., 1909) 22, 23

The Federalist No. 45 (James Madison) 9

The Federalist No. 47 (James Madison) 10

The Federalist No. 51 (James Madison) 14

The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds., 2005) 13

Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593 (1997) 6, 13

General Accounting Office, *Principles of Federal Appropriations Law* (3d ed. 2006) 12

Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099 (2004) 6, 7

Comments of James Iredell, Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 193 (discussing the Test and Corporation Acts) 8, 9, 13

TABLE OF AUTHORITIES, cont'd

Page(s)

Charles Fenton James, *Documentary History of the Struggle for Religious Liberty in Virginia* (1900) 25

Thomas Jefferson, *Autobiography* (1821), *in* 1 *Works of Thomas Jefferson* 71 (Plaul Leicester Ford ed., 1904–05) 22

Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 *Papers of Thomas Jefferson* 305 (Julian P. Boyd et al. eds., 1950) 22

Letter from Thomas Jefferson to Reverend Millar (Jan. 23, 1808), *in Church and State in American History* 74 (John F. Wilson & Donald L. Drakeman eds., 2003) 15

Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), *in Church and State in American History* 74 (John F. Wilson & Donald L. Drakeman eds., 2003) 15

Peter Jupp, *The Governing of Britain, 1688–1848* (2006) 12

Erwin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 Alb. L. Rev. 91 (1998) 5

Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986) 14

TABLE OF AUTHORITIES, cont'd

Page(s)

Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 *Writings of James Madison* 100 (Gaillard Hunt ed. 1910) 16, 26

James Madison, *Madison's "Detatched Memoranda"*, 3 Wm. & Mary Q. 534 (Elizabeth Fleet ed. 1946) (ca. 1817) 16, 26

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8 *Papers of James Madison* 298 (William T. Hutchinson et al. eds., 1973) 21, 24

James Madison, *Proposal for a Bill of Rights* (June 8, 1789), *in A Second Federalist: Congress Creates a Government* (Charles Hyneman & George Carey eds., 1967) 14

Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* (2002) 6

Papers of James Madison (William T. Hutchinson ed., 1977) 16, 21, 22, 24

Comments of Charles Pinckney, Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution, Jan. 17, 1788, 4 *Elliot's Debates* 286 9

Comments of Edmund Randolph, Debates in the Convention of the Commonwealth of Virginia, June 10, 1788, 3 *Elliot's Debates* 201 10

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 11, 14, 20

TABLE OF AUTHORITIES, cont'd

Page(s)

Virginia, Act for Establishing Religious Freedom (Oct. 31, 1785), *in* 8 *Papers of James Madison* 399 (William T. Hutchinson et al. eds., 1973) 22

John Witte, Jr., *Religion and the American Constitutional Experiment* (2000) 6

INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and law scholars who teach or have taught courses in American and British legal history, American and British constitutional history, constitutional law, First Amendment law, religion and the law, seventeenth, eighteenth, and nineteenth century American history, and in related areas in law schools and undergraduate and graduate schools across America. They have written and edited books and written articles in scholarly journals on related issues.

Amici file this brief in support of the Respondents' challenge to the President's Faith-Based and Community Initiatives program. We believe, based on our training and study as legal historians and law scholars, that there is no historical basis or support for the Government's claim that the President's program should be insulated from judicial review.

Amici's names and institutional affiliations (listed for identification purposes) are as follows:

Paul Finkelman is the President William McKinley Distinguished Professor of Law and Public Policy at Albany Law School.

Joyce Appleby is a Professor of History Emerita at University of California, Los Angeles.

Carl T. Bogus is a Professor of Law at Roger Williams University School of Law.

Erwin Chemerinsky is the Alston and Bird Professor of Law and Science at Duke University.

Norman Dorsen is the Stokes Professor of Law at New York University.

Ronald B. Flowers is the John F. Weatherly Emeritus Professor of Religion at Texas Christian University.

---

[1] Letters of consent from all parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part.

Edwin S. Gaustad is an Emeritus Professor of History and Religious Studies at University of California, Riverside.

Steven G. Gey is the David and Deborah Fonvielle & Donald and Janet Hinkle Professor of Law at Florida State University.

Beth Simone Noveck is the Director of the Institute for Information Law & Policy at New York Law School and the McClatchy Visiting Associate Professor at Stanford University.

Robert M. O'Neil is a Professor of Law at the University of Virginia.

Edward A. Purcell, Jr. is the Joseph Solomon Distinguished Professor at New York Law School.

Frank S. Ravitch is a Professor of Law at Michigan State University College of Law.

Nadine Strossen is a Professor of Law at New York Law School.

Laura Underkuffler is the Arthur Larson Professor of Law at Duke University.

Samuel L. Webb is an Associate Professor of History at the University of Alabama at Birmingham.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government's account of the pertinent historical record is incomplete. When the Government mentions history in its brief, it does so by referring to isolated statements, without reference either to the larger historical context or even, in some cases, to other statements made by their sources. By way of example, the Government points to the remarks of a Continental Congress from long before the most important debates on religious liberty under the new Constitution were waged (*e.g.*, Pets.' Br. at 39) (quoting the Continental Congress in 1778). The Government also relies on support from both Thomas Jefferson and James Madison (*e.g.*, Pets.' Br. at 37), both of whom spoke directly against the positions the Government takes in its brief. And the

Government argues that the Framers "focused narrowly on the fear that *Congress* would use its power forcibly to transfer funds from taxpayers into the coffers of churches" without asking or attempting to answer whether that was because the Framers would have preferred the President to do so (Pets.' Br. at 41) (emphasis added). As this brief will explain, the answer to that question is "no." *Amici* hope the Court may benefit from a broader historical view that places the issues at the heart of this case in context.

The history of the Establishment Clause forms a critical piece of the analysis in this case. In *Flast* v. *Cohen*, this Court held that a person has standing to sue based on status as a taxpayer to challenge the expenditure of funds by Congress in violation of the Establishment Clause. 392 U.S. 83 (1968). In *Flast*, the Court looked to the historical purpose of the Establishment Clause as a limitation on Congress's spending power. That historical purpose provided the basis for creating an exception to the usual bar against taxpayer standing to help prevent "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption[:] . . . that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103.

The Government argues that respondents lack standing because this case involves discretionary expenditures by the executive of funds not earmarked by Congress for any specific purpose. For support, the Government argues that *Flast* linked taxpayer standing to an historical concern specifically about *legislative* funding of religion. The Government purports to identify a consistent thread running through *Flast* and its progeny holding that "taxpayer standing . . . was designed to protect against 'abuses of *legislative power*.'" (Pets.' Br. at 21) (quoting *Flast*, 392 U.S. at 106) (Petitioners' emphasis). Alternatively, the Government argues that standing fails in challenges to tax dollars spent only "internally" — that is, not on any particular private group. The

Government argues that, because "the Executive [does] something other than disburse funds" (Pets.' Br. at 29), respondents are in essence challenging the use of federal funds admittedly in support of religion but "incidental" to "the administration of an essentially regulatory" program. *Flast*, 392 U.S. at 102.

The Government's arguments are incorrect. The history of the Founding demonstrates a grave concern about interference by the federal government with religion. At the time of the Founding, history had shown that the danger of such interference lay in the fact of funding itself — it depended upon the identity of neither the benefactor nor the beneficiary. In fact, the origins of "establishment" in England lay with the monarch, not with Parliament. It is therefore highly unlikely that the Framers would have been indifferent to threats of establishment created by the executive branch. On the contrary, the Framers designed a government of limited powers in which the power of the purse and the power to make the laws were vested entirely in Congress. Knowing that these were the powers that made state-established religion possible, the Framers expressly secured religious liberties under the Establishment Clause from the reach of Congress. In doing so, they believed that they had removed any possibility of interference from the federal government in religious matters, thus satisfying Anti-Federalist demands that religion remain a local issue. The historical record strongly indicates that neither expenditures by the executive nor those supposedly "internal" to the government were meant to be outside of the Constitution's protections.

ARGUMENT

I. THE FRAMERS WOULD NEVER HAVE CONTEMPLATED OR APPROVED OF EXECUTIVE SPENDING IN FURTHERANCE OF RELIGIOUS PURPOSES.

A. The British Monarch Played a Vital Role in the Religious Establishment and Religious Persecution in England.

The historical study of the danger of state-established religion begins with the executive branch: the Church of England was initially established by a monarch, not by Parliament.[2] In 1534, King Henry VIII broke from Rome and the Catholic Church, established the Church of England, and declared himself "Supreme Ruler of Church and Kingdom."[3] After his death, the fate of the Church of England hung on the favor of the current monarch, as the religion of the nation fluctuated in accordance with the religious affiliations of the Roman Catholic Queen Mary and the Protestant Queen Elizabeth I.[4] The very existence of the Church of England was contingent on the desire of the current monarch.

Although the monarchs sought conformation from Parliament through the Act of Succession in 1534 and subsequent acts of conformity, suppression of religious nonconformity came primarily at the hands of the crown. In their efforts to enforce their religious prerogative on their subjects, these monarchs employed a plethora of oppressive methods:

---

[2] *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1404–05 (2004) (describing the establishment of religion in Britain from the reign of Henry VIII through George I).

[3] 1 William Blackstone, *Commentaries* *230, *269.

[4] *See* Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 Alb. L. Rev. 91, 144–45 (1998); *see also* Esbeck, *supra* note 2, at 1408–14.

forbidding those not of their religion from holding office,[5] creating ecclesiastical courts to try crimes against the state religion,[6] allowing the practice of only their religious beliefs,[7] and imprisoning and even executing religious dissenters.[8] The monarchs were empowered to correct "the ecclesiastical state and persons, and . . . all manner of errors, heresies, [and] schisms . . . ."[9] Parliament acted in concert with the crown, enacting laws such as the Test and Corporation Acts,[10] which restricted office-holding in government, the military, public corporations, and academic positions to members of the Church of England.[11]

In addition to choosing and implementing a national religion, the British monarchs also had a substantial role in defining the substance of Church doctrine and liturgy. The monarch was the final arbiter of doctrinal questions[12] and chose bishops,[13] and both Henry VIII and Elizabeth I took the title of Supreme Leader of the Church.[14] A figurehead,

---

[5] *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593, 612–13 (1997) (describing the continuing though lessening impact of the Test and Corporation Acts of 1673).

[6] *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1127 (2004) (describing the High Commission and ecclesiastical courts formed by Henry VIII, and their role in "enforc[ing] spiritual uniformity on the people.").

[7] *Id.* at 1141.

[8] *See* Franck, *supra* note 5, at 609–11; Hamilton, *supra* note 6, at 1141–51.

[9] 1 Eliz. 1, c.2 (1559) (Eng.).

[10] *See* 13 Car. 2, st. 2, c.1 (1661) (Eng.); 25 Car. 2, c.2 (1672) (Eng.).

[11] *See* John Witte, Jr., *Religion and the American Constitutional Experiment* 14–19 (2000); Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* 21–24 (2002).

[12] 1 Blackstone, *supra* note 3, at *269 ("In virtue of this authority the king convenes, prorogues, restrains, regulates, dissolves all ecclesiastical synods or convocations.").

[13] *Id.* at *365–69.

[14] *Id.* at *269.

drafter of doctrine, and appointer of bishops, the British monarch was consistently and intimately involved in the establishment and development of the Church of England.

Even after the "Glorious Revolution" of 1688–89 shifted the locus of power in British government, resulting in a more circumscribed monarch and a more empowered Parliament, the monarch retained substantial control over religious matters. The monarch still appointed bishops[15] and maintained his position as the ultimate authority on ecclesiastical questions.[16] A parson or a vicar could lose his post for "maintaining any doctrine in derogation of the king's supremacy, or of the thirty nine articles, or of the book of common prayer . . . ."[17] As William Blackstone noted in his *Commentaries*, "Upon the whole therefore I think it is clear, that, whatever may have become of the nominal, the real power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired."[18] Despite granting control over certain aspects of the Church to Parliament, such as determining the text of the Book of Common Prayers, the monarch therefore retained important powers.[19]

The Framers were fully aware of this history and would not have been indifferent to the threat of executive establishment in this country.[20] On the contrary, the role of the

---

[15] *Id.* at *367 ("After [appointment], the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only."); *see also* J.C.D. Clark, *English Society 1660–1832*, at 55 (2d ed. 2000).

[16] 1 Blackstone, *supra* note 3, at *269.

[17] *Id.*

[18] *Id.*

[19] *Id.* at *325–26.

[20] *See* Esbek, *supra* note 2, at 1419–20 (describing the Framers' awareness of and concern due to religious persecution in England); *see also* Hamilton, *supra* note 6, at 1141 (same); James A. Campbell, Note,

monarchy in establishing the Church of England — and in perpetuating the attendant religious persecution Americans feared — was so fundamental that a prohibition on establishment by a legislative body only, and permitting such establishment by the executive, would have been unthinkable to the Framers.[21]

By the same token, the Framers' experience had demonstrated that a close intertwinement of legislative and executive functions together infringed on religious liberties. Members of the founding generation were acutely aware of the evolution of the Anglican church into the Church of England during the sixteenth and seventeenth centuries at the instigation of the monarchy, and the subsequent interplay that existed between the crown and Parliament.[22] It is therefore unlikely that those of the founding generation would have distinguished between legislative and executive functions or viewed the latter as less apt to violate freedom of conscience.

Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541, 545–46 (2006) (same).

[21] The dangers of a monarch with free reign over religious liberty were well understood by the Continental Congress in 1774 when it attempted to persuade colonists in Quebec to join in resistance to the Crown. "Such is the precarious tenure of mere *will*, by which you hold your lives and religion. The Crown and its Ministers are empowered, as far as they could be by Parliament, to establish even the *Inquisition* among you." 1 *Journal of the Continental Congress* 109 (Ford et al. eds., 1774).

[22] *See* Comments of James Iredell, Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 193 (discussing the Test and Corporation Acts).

B. The Structural Design of the Constitution Foreclosed the Establishment of Religion by the Executive Branch.

1. The Framers Created a Government of Limited Powers.

The Framers of the new Constitution established a government of limited powers. According to James Madison, "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[23] The Framers based their decisions about how to structure the new government in part on the lessons of the British experience, which demonstrated the havoc that could result from a state religion controlled by both a legislative body and the executive.[24] In doing so, they took careful measures to circumscribe the authority of the executive and legislative branches. Taken together with the First Amendment, these circumscriptions foreclosed the ability of either branch to use tax monies to promote religion.

2. Structural Limitations on Executive Power Made "Establishment" Impossible.

Although the Framers carefully allocated power among the branches of the federal government, they expressed relatively little concern about the possibility of the President es-

---

[23] The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). This arrangement was universally understood. In explaining why South Carolina should ratify the Constitution, General Charles Cotesworth Pinckney explained at that "it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states." Comments of Charles Pinckney, Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution, Jan. 17, 1788, 4 *Elliot's Debates* 286. Pinckney's comments were in regard to slavery and reflect that the limited nature of the federal government's powers were critical to the southern states' accession to the new Constitution.

[24] *See* Comments of James Iredell, *supra* note 22.

tablishing religion. The reason was not indifference to that possibility but a firm belief that the Constitution's structure eliminated it. The Framers believed that structural limitations on the President's authority made establishment of religion by the Executive Branch impossible. Madison wrote that the President "cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it."[25]

Just as the President could not "make" laws establishing religion, nor could he raise independent money as a vehicle to establish religion. Unlike the British monarch at the time of the establishment of the Church of England, the president could not sell feudal land or impose feudal taxes to raise ready cash to fund such projects. During the Virginia Ratification Convention, Governor Edmund Randolph compared the theoretical president to the monarch in the English system, stating that the President

> "can handle no part of the public money except what is given him by law .... He can do no important act without the concurrence of the Senate. In England, the sword and purse are in different hands. The king has the power of the sword, and the purse is in the hands of the people alone. Take comparison between this and the government of England. It will prove in favor of the American principle .... In England, Parliament gives money. In America, Congress does it."[26]

The President, in fact, depended entirely upon appropriations from Congress to fulfill his duties. And the excruciatingly detailed early appropriations bills demonstrate quite

---

[25] The Federalist No. 47 at 303 (James Madison).

[26] Comments of Edmund Randolph, Debates in the Convention of the Commonwealth of Virginia, June 10, 1788, 3 *Elliot's Debates* 201.

clearly that early presidents simply did not have access to discretionary funds. One early appropriations bill provided, for example: "For compensation to the Treasurer, clerks, and persons employed in his office, four thousand four hundred dollars. For expense of firewood, stationery, printing, rent, and other contingencies in the treasurer's office, six hundred dollars."[27]

Justice Story would later recognize the importance of this structural arrangement in his *Commentaries on the Constitution*. "The power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance."[28] He contrasted the arrangement with an unseemly alternative: "In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, *and is beyond responsibility or reproof*."[29]

Justice Story's analysis also recalls the English common law, under which the monarch could raise funds in any number of ways. Blackstone devoted an entire chapter to detailing the various sources and types of income the King received "to support his dignity and maintain his royal power."[30] Historically, the Crown's income derived from a wide variety of sources: the forests and any proceeds thereof, such as fines, shipwrecks, strays, fees paid by bishops, and feudal taxes.[31] By the time of the Founding, taxation income represented the bulk of the King's wealth. "The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of

---

[27] Act of Feb. 5, 1796, ch. 1, 4 Stat. 445; *see also, e.g.*, Act of Mar. 14, 1794, ch. 6, 3 Stat. 342; Act of Dec. 23, 1791, ch. 3, 1 Stat. 226.

[28] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (1833).

[29] *Id.* (emphasis added).

[30] 1 Blackstone, *supra* note 3, at *271.

[31] *Id.*; *see also* Clark, *supra* note 15, at 56–57.

new officers, created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation."[32] Though Parliament voted on the amount of this income for the life of a given king, the income went to the Crown, and the raising and collecting of the income was within the exclusive purview of the King.[33] The monarch was thus fiscally independent at the time of the establishment of the Church of England and remained flush with taxation income after the Glorious Revolution.

The American president was never intended to have such free reign over the national fisc.[34] Given the President's reliance on appropriations from Congress and the detailed nature of these appropriations, George Washington could not possibly have established the Office of Faith Based Initiatives independently. The Government's description of the nature of discretionary appropriations *today* obscures the fact that an early President could only have established the Office of

---

[32] 1 Blackstone, *supra* note 3, at *324. *See also* Peter Jupp, *The Governing of Britain, 1688–1848*, at 34 (2006).

[33] *See* Clark, *supra* note 15, at 56–57. "The Civil List Act of 1698 transferred many powers of expenditure to Parliament, but allowed the king to retain revenue "for the purpose of government ... the most sensitive areas of expenditure, particularly as they were often used for political manipulation and were not really made accountable to the House of Commons until the 1780s." Richard Brown, *Church and State in Modern Britain, 1700–1850*, at 36 (1991).

[34] It is widely recognized that the realities of the modern administrative state compel less direct control by Congress over the funds spent by the executive branch. While the first appropriations bill, passed in 1789, ran one paragraph in length and appropriated a total of $639,000 to very specific purposes, in recent times, "as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity." 2 General Accounting Office, *Principles of Federal Appropriations Law* 6-5 (3d ed. 2006). By necessity under modern realities, though "Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar." *Id.* But the important fact is that, even today, Congress ultimately *controls* the destiny of every single taxpayer dollar.

Faith Based Initiatives by specifically *requesting* money for that purpose — a request that would surely have been denied on the grounds that a Congressional expenditure of resources dedicated to that purpose would violate the First Amendment.

In the limited circumstances in which the Founders perceived a potential for executive abuses against religious freedom, they provided protection. The evils of establishments had not historically been entirely limited to financial extractions and expenditures on behalf of religion. Establishment of state religion had also been enforced by awarding civil rights and privileges based on proper religious affiliation. Derived from the Test and Corporation Acts, colonial establishments in America commonly limited rights of public office holding to Protestants and imposed religious requirements that affected nonconformists' access to legal and political institutions.[35]

The Founders did away with this arrangement in the Constitution under the "Test Clause," which provided that "No religious Test shall ever be required as a Qualification to any Office of public Trust under the United States."[36] The extensive ratification debate over the Test Clause indicates that the founding generation perceived the attributes of religious establishments to extend beyond the mere financial support of religion to matters that affected one's standing and participation in the larger political community.[37] The President, in conjunction with the other branches of government, was made subject to the Test Clause. The Framers foresaw that "without some prohibition of religious tests, a successful sect, in our country, might, by once possessing power, pass test-laws, which would secure to themselves a monopoly of

---

[35] *See* Comments of James Iredell, *supra* note 22, at 193 (discussing the Test and Corporation Acts); Franck, *supra* note 5, at 615–16.

[36] U.S. Const. art VI, cl. 3.

[37] *See generally* 4 *The Founders' Constitution* 634–45 (Philip B. Kurland & Ralph Lerner eds., 2005).

all the offices of trust and profit, under the national government."[38] The Test Clause thus prevents one form of establishment by the executive.[39]

3. Barring "Congress" From Establishing Religion Comprehensively Applies to the Federal Government.

As their debates and contemporary correspondence reveal, the Founders did not consider the evils of establishments and church-state orderings restricted to expenditures by legislatures. On the contrary, their experience demonstrated that executive abuses of religious liberty were possible and that a close intertwining of legislative and executive functions also infringed on religious liberties. Because, however, the Framers did not anticipate the rise of the modern administrative state or the consequent sea change in the nature and breadth of appropriations, they reasonably thought that, under the structure of the new Constitution, Congress was the most dangerous branch.[40] They formulated the Establishment Clause with this in mind.

---

[38] 3 Story, *supra* note 28, §§ 1841–43.

[39] The Framers did not view the Test Clause as the only check on the executive's ability to establish religion. The debates surrounding the Establishment Clause illustrate the applicability of the Clause to branches other than Congress: when it was suggested that the Establishment Clause bound the judiciary branch, Madison did not disagree with such an interpretation. *See* Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 889–92 (1986).

[40] The Federalist No. 51 (James Madison), *supra* note 23, at 322. Madison also said that "it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other, because it is not the stronger branch of the system, but the weaker. It therefore must be leveled against the Legislative, for it is the most powerful and most likely to be abused." James Madison, *Proposal for a Bill of Rights* (June 8, 1789), *in A Second Federalist: Congress Creates a Government* (Charles Hyneman & George Carey eds., 1967).

(a) Correspondence. — The papers of the architects of the religious liberty clauses disclose no contemplation of executive establishment powers. Thomas Jefferson — often quoted for his "wall of separation between church and State"[41] — explained often that the wall was to be comprehensive: "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions . . . . Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government."[42] In an earlier version of Jefferson's "wall" letter, he explained even more specifically that "Congress thus inhibited from acts respecting religion, *and the Executive authorized only to execute their acts, I have refrained from prescribing even occasional performances of devotion.*"[43] In a response to criticism that he did not proscribe a day of national fasting and prayer, Jefferson again returned to anti-establishment principles: "*civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.*"[44]

Correspondence from James Madison shows that he, too, believed that the Constitution secured religious liberty against all branches. He wrote: "Why should the expense of a religious worship be allowed for the Legislature, be paid by the public, more than that for the *Ex. or Judiciary branch of*

---

[41] Thomas Jefferson, *Letter from Thomas Jefferson to the Danbury Baptists* (Jan. 1, 1802), *in Church and State in American History* 74 (John F. Wilson & Donald L. Drakeman eds., 2003).

[42] Thomas Jefferson, *Letter from Thomas Jefferson to Reverend Millar* (Jan. 23, 1808), *in Church and State in American History, supra* note 41, at 74.

[43] *See* Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 41 (2002) (emphasis added).

[44] *Id.* (emphasis added).

the Govt?"[45] And although Madison, unlike Jefferson, eventually succumbed to popular pressure and precedent by issuing Thanksgiving Day proclamations, he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory."[46] But he later regretted and questioned his authority to take even this circumscribed action. In hindsight, he wrote that "[r]eligious proclamations by the Executive recommending thanksgivings [and] fasts are shoots from the same root with the legislative acts reviewed,"[47] and thus deemed the proclamations as illegitimate as legislative establishment.

(b) The Debates. — The perceived need for a constitutional guarantee against establishment in a bill of rights arose from the lack of any such express provision in the Constitution. The need itself was not universally acknowledged. Madison and others believed that, even without a bill of rights, the Constitution prevented federally sponsored religion by not expressly granting any branch the power to establish it. As Madison explained during the Virginia ratifying convention, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."[48] But when the first Congress turned its attention to a bill of rights, Madison recognized that

> "some of the State Conventions . . . seemed to entertain an opinion that under the clause of

---

[45] James Madison, *Madison's "Detatched Memoranda"*, 3 Wm. & Mary Q. 534, 559 (Elizabeth Fleet ed. 1946) (ca. 1817) (hereinafter "Madison, Detatched Memoranda") (emphasis added).

[46] *Letter from James Madison to Edward Livingston* (July 10, 1822), *in* 9 *Writings of James Madison* 100–03 (Gaillard Hunt ed. 1910). In the same letter, Madison explained he felt compelled to "follow the example of predecessors." *Id.*

[47] Madison, Detatched Memoranda, *supra* note 45, at 560.

[48] 11 *Papers of James Madison* 130–31 (William T. Hutchinson ed., 1977).

> the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion."[49]

The rest of the debate in Congress proceeded on the conclusion that the threat of national establishment *vel non* came from Congress. In a speech before the House of Representatives, while introducing his draft of the proposed amendment, Madison described the purpose as "to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[50] Madison drew no distinction between the executive and legislative branches and spoke generally of Government, and of the powers that should be withheld from the federal government as a whole, and the remaining debates disclose absolutely no attention to such a distinction.[51]

The debates in the States over the Constitution and, later, over the provision that would become the Establishment Clause continued to center on federalism rather than separation-of-powers concerns.[52] Those debates shed further light on the original understanding of the purpose of the Estab-

---

[49] 1 *Annals of Congress* 729–31 (Joesph Gales ed., 1789).

[50] *Id.* at 437.

[51] *See, e.g.*, 1 *Documentary History of the First Federal Congress of the United States of America* 136, 151–66 (L. Grant De Pauw ed., 1972); 3 *id.* at 288.

[52] *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. Church & St. 311, 313–21 (2000) (compiling authorities for this proposition). As these debate occurred prior to the application of the Bill of Rights to the states via the Fourteenth Amendment, the Anti-Federalists were focused on retaining the right, in each individual state, to legislate on religious matters.

lishment Clause — to effect a bar that applied to the federal government as a whole.

During Virginia's Constitutional Convention, Madison insisted that, "were uniformity of religion to be introduced by this system, it would, in my opinion, be ineligible . . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."[53] Though he was speaking before the Bill of Rights was introduced, Madison left no doubt that he believed that religion was outside the purview of the entire federal government.

Even the Anti-Federalists in Virginia, while worrying about the precise language of the Establishment Clause, understood that it was designed to serve their interests in keeping the new national government out of religion. As one group of eight state Senators explained, the Clause

> "does not prohibit the rights of conscience from being violated or infringed: and although it goes to restraining Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination . . . might be so favored and supported by the General Government . . . and in process of time render it as powerful and dangerous as if it was established as the national religion of the country. . . . This amendment then, *when considered as it relates to any of the rights it is pretended to secure*, will be found totally inadequate."[54]

---

[53] Neil H. Cogan, *The Complete Bill of Rights* 69 (1997) (quoting Madison).

[54] Journal of the Senate of the Commonwealth of Virginia, Begun and Held in the City of Richmond, on Monday, the 18th of October . . . 1789, at 62 (Richmond, 1828) (emphasis added).

The Virginian Anti-Federalists — though worried that an aggressive national government would exploit the wording of the Establishment Clause to subvert its protections — nonetheless understood the intended scope of those protections. The Clause was intended to prohibit establishment by the federal government.

Likewise, in North Carolina's ratification convention, the debate turned to whether religious and civil liberties would be secured by the Constitution. Responding to the question of whether "the general government may not make laws infringing" religious liberties,[55] Richard Spaight explained that "[a]s to the subject of religion . . . . [n]o power is given to the *general* government to interfere with it at all. Any act of Congress on this subject would be a usurpation."[56] Spaight believed that the Constitution, because it did not explicitly grant a power regarding religion to the national government, protected religious liberty because the states retained that power. This observation, which was typical of Anti-Federalists, reflects the common understanding that the federal government, as a whole, would be restricted from acting on religious issues by the Constitution.

Pennsylvania ratified the Constitution, but a strong and vocal minority issued a dissenting report offering recommendations to the federal delegation, one of which read "[t]he right of conscience shall be held inviolable, and neither the legislative, *executive* nor judicial powers of the United States shall have authority to alter, abrogate or infringe any part of the constitution of the several States, which provide for the preservation of liberty in matters of religion."[57] Although the perspectives of this minority did not win the day in that state, they made clear those clamoring for a bill of rights believed

---

[55] Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 191.

[56] *Id.* at 208 (emphasis added).

[57] 1 *The Complete Anti-Federalists* 22 (Herbert J. Storing ed., 1981) (emphasis added).

that all branches of government, not just the legislative branch, should be restricted from usurping state rights in the area of religion.

At New York's ratification convention, one member stated that he "could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the *general* government from tyrannizing over our consciences by a religious establishment."[58] This too indicates that the fear of religious establishment was not unique to the legislative branch, but to the government as a whole.

Ultimately, in this context, the Anti-Federalists believed that they had retained authority over religion as residual state sovereignty.[59] Had the Framers intended to limit Congress while leaving the President unrestricted regarding establishment of religion, that decision would have had enormous implications for the federalism debate and would necessarily

---

[58] Neil H. Cogan, *The Complete Bill of Rights*, *supra* note 53, at 62 (emphasis added).

[59] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 16 n.54 (1998) (compiling authorities for this proposition). Historians immediately after ratification also realized this implication. *See, e.g.*, 3 Story, *supra* note 28, § 1873 ("In some of the states, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of religious tests. Thus, *the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions*; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." (emphasis added)).

have required discussion of that specific delineation of power. The legislative history does not indicate that the Framers intended to make that distinction, nor that they conceived that the debate would ever turn on such terms. Indeed, the legislative history indicates just the opposite: The Framers wanted disestablishment to apply to the "general" government, including the executive branch.

These generalized concerns about governmental infringements on religious liberty — legislative and executive alike — are also reflected in state constitutional history. The debates regarding Virginia's decision whether to establish religion provide substantial guidance as to the intended meaning of the Establishment Clause. James Madison again played an important role. In his *Memorial and Remonstrance Against Religious Assessments*, he wrote that as "[r]eligion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former."[60] Madison continued, arguing that "[r]eligion be not within the cognizance of Civil Government."[61] Madison along with others at the Founding believed that establishment should be prohibited to the national government as a whole, to all branches of government, not specifically or uniquely to the legislature.

Madison's *Memorial and Remonstrance* was successful, and the bill that he militated against was defeated. In its place, a bill drafted by Thomas Jefferson guaranteeing reli-

---

[60] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8 *Papers of James Madison* 298 (William T. Hutchinson et al. eds., 1973) (hereinafter "Madison, Memorial and Remonstrance"). The *Memorial and Remonstrance* was written in opposition to a bill, introduced in the General Assembly of Virginia, to levy a general assessment for the support of teachers of religions.

[61] *Id.*

gious freedom was enacted.[62] Jefferson explained in his bill's preamble that

> "the impious presumption of legislators *and rulers*, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking, as the only true and infallible, and as such, endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world."[63]

Jefferson's broad language — embracing both "legislators and rulers" — defines the threat to religious freedom as one that comes from government generally, and not from any particular branch. His words reflect the experience of the colonists and the founding generation that involvement in religion by any branch of government carries with it the risk of oppression.

In other states, the majority of provisions regarding rights of conscience and disestablishment spoke in generic terms applicable to all levels of government.[64] Article I of the 1792

---

[62] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 *Papers of Thomas Jefferson* 305 (Julian P. Boyd et al. eds., 1950).

[63] *Id.* (emphasis added). As Jefferson himself noted, his bill — though "drawn in all the latitude of reason and right" — "still met with opposition" and underwent "some mutilations" in the time between his initial draft of the Bill, in 1779, and its ultimately enacted form in 1785. *See* Thomas Jefferson, *Autobiography* (1821), *in* 1 *Works of Thomas Jefferson* 71 (Plaul Leicester Ford ed., 1904–05). Notwithstanding these "mutilations," the final act contained the same language respecting legislators and rulers. *See Virginia, Act for Establishing Religious Freedom* (Oct. 31, 1785), *in* 8 *Papers of James Madison* 399–401 (William T. Hutchinson et al. eds., 1973).

[64] *See* 1–7 *The Federal and State Constitutions* 568, 800–801, 1689, 1889, 2454, 2597, 3100, 3752 (Francis Newton Thorpe ed., 1909) (repro-

Delaware Constitution expressly required that "no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship . . . ."[65] Similarly, Article I of the 1790 Pennsylvania Constitution mandated that "no human authority can, in any case whatever, control or interfere with the rights of conscience."[66] These state constitutional provisions evince the common understanding that threats to religious liberty via establishments came from governments generally, not solely through legislative acts.

The striking common thread in this history is the lack of any discussion of a carve-out for executive support of religion. Without any historical context, two inferences from that silence might be possible — an implicit blessing of executive establishment, or confidence that such a thing was impossible. Given the actual historical record, however, only the latter is plausible. James Madison — the same person who believed that a bill of rights was unnecessary because the

---

ducing Constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and Vermont). Article IV, section 10, of the Georgia Constitution of 1798 is representative: "No person within this State shall, upon any pretense, be deprived to the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tiths (sic.), taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to so. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles." 2 *id.* at 780. Connecticut and Rhode Island did not draft constitutions until the nineteenth century; South Carolina proclaimed the establishment of the "Christian Protestant religion" in article XXXVIII of its 1778 constitution. 6 *id.* at 3255.

[65] 1 *id.* at 568.

[66] 5 *id.* at 3100.

Congress had no power to establish religion in the first place — played a large role in drafting the Establishment Clause. To impute a secret design by the author of the *Memorial and Remonstrance Against Religious Assessments* to provide in the executive branch a safe haven for national religion is to pervert history.

II. THE FRAMERS MADE NO DISTINCTION BETWEEN TAX DOLLARS EXPENDED INTERNALLY OR EXTERNALLY FOR RELIGIOUS PURPOSES.

It is well recognized that the Establishment Clause was designed in part to prevent government from being able to "force a citizen to contribute three pence only of his property for the support of any one establishment."[67] Whether the government should be able to use those three pence to support religion internal or external to the government was in fact a matter of some debate before and after adoption of the First Amendment. Ultimately, the decision was to bar any use of tax funds to support religion.

The English model had featured a church that was in a very real sense "internal" to the government. As outlined above, the crown was the head not only of the government, but of the Church of England. Even as power devolved to Parliament over time, the Church of England grew no more "external" to the government. Indeed, as recognized by Justice Story,

> "[a]t common law the church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm; but it is no more, on that account, a corporation, than the nobility in their collective capacity. . . . In this sense the church of England is said to have peculiar rights and privileges, not as a corporation, but

---

[67] Madison, Memorial and Remonstrance, *supra* note 60.

> as an ecclesiastical institution under the patronage of the state."[68]

Thus, far from enjoying immunity from the efforts of those who sought disestablishment, "internal" expenses toward the establishment of religion were the central evil against which those efforts were aimed.

Virginia's own debate on establishment is again illuminating. In May of 1784, only shortly before Jefferson's Bill for Establishing Religious Freedom ultimately secured total defeat of state-supported religion, the legislature was actively considering at least two other alternatives. The first would have restored a modified state establishment — *i.e.*, an "internal" church.[69] The second — which ultimately manifested itself in a bill supported by Patrick Henry entitled "Bill Establishing a Provision for Teachers of Religion" — would have provided for a general assessment for the support of churches without designating a "state" church.[70] Thus, while no "internal" church would be formed, "external" churches would have been able to depend on financial support from the taxpayers. This second variant — which came to be known as the General Assessment Bill — enjoyed substantial support and appeared poised to become law. In the wake of Madison's *Memorial and Remonstrance*, however, and following Patrick Henry's departure from the legislature upon his election as governor, the General Assessment Bill lost out to Jefferson's Bill for Establishing Religious Freedom.[71] This precursor to the Establishment Clause comprehensively abolished state support of religion — whether for internal or external religious causes.

---

[68] *Town of Pawlet* v. *Clark*, 9 Cranch 292, 325 (1815).

[69] *See* Charles Fenton James, *Documentary History of the Struggle for Religious Liberty in Virginia* 122–23 (1900).

[70] *Id.* at 122–23, 129–30. The taxpayer could elect the designee of his tax dollars.

[71] *Id.* at 140–41.

Furthermore, although the debates over the First Amendment's ratification shed little light on the distinction between funds spent on religion internally and those spent externally, James Madison addressed the issue in the years after his Presidency. Although he acknowledged that the practice of paying for a Congressional chaplain[72] had become an established precedent "not likely to be rescinded" — a forecast later proven quite prescient by this Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1982) — he could justify it only on the basis of "*de minimis non curat*" — *i.e.*, the law does not concern itself with trifles.[73] In addressing directly whether the practice was permitted under the Establishment Clause, he was unequivocal:

> "Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom?
>
> "In strictness the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment . . . [?]"[74]

---

[72] As a governmental employee with no duties to the public – *i.e.*, no "external" duties – the Congressional chaplain signifies an "internal" expense for religious purposes.

[73] *Letter from James Madison to Edward Livingston*, *supra* note 46.

[74] Madison, Detatched Memoranda, *supra* note 45, at 558. Though this Court upheld the practice of state-financed legislative chaplains in *Marsh*, it did so on the basis of history alone, and not because the practice is consistent with the principles of the Establishment Clause. *See Marsh*,

Finally, it is plain that the character of the resistance to expenses in support of religion — internal or external — could not hinge on whether Congress or the executive branch purported to authorize it. As outlined in the previous section, the structure of the Constitution left no fear that the executive would ever be free independently to authorize the use of taxpayer dollars. The vesting of the appropriation power in Congress was thought to be "the great bulwark which our Constitution had carefully and jealously established against Executive usurpations."[75] The President's use of taxpayer money to establish religion would have been no less anathema to the Framers simply because the program was termed "internal" to the federal government.

---

463 U.S. at 795–96 (Brennan, J., dissenting) (describing the Court's holding as defining the practice to be "an exception" to the Establishment Clause in light of its "unique history").

[75] 3 *Annals of Congress* 938 (1793) (statement of James Madison).

CONCLUSION

For the reasons stated, this Court should affirm the ruling of the Court of Appeals.

Respectfully submitted,

STEVEN K. GREEN
WILLAMETTE UNIVERSITY
COLLEGE OF LAW
245 Winter Street, S.E.
Salem, Oregon 97301
(503) 370-6732

MATTHEW M. SHORS
(Counsel of Record)
GEOFFREY M. WYATT
ELI J. KAY-OLIPHANT*
AMBER TAYLOR**
ANNE CORTINA*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Admitted in N.Y. only. **Admitted in Cal. only

Attorneys for Amici Curiae

Dated: February 2, 2007